TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 532.

THE COUNTY OF MOULTRIE, PLAINTIFF IN ERROR,

vs.

THE ROCKINGHAM TEN CENTS SAVINGS-BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED JUNE 8, 1875.

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BRIEF.

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Reply

HENRY & PENWELL AND JOHN R. EDEN,

FOR PLAINTIFF IN ERROR.

Commercial Steam Print, Danville, Ill.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

NO. 532.

THE COUNTY OF MOULTRIE, PLAINTIFF IN ERROR,

VS.

THE ROCKINGHAM TEN CENTS SAVINGS-BANK, DEFENDANT IN ERROR.

REPLY OF HENRY & PENWELL AND JOHN R. EDEN.

DEFENDANT IN ERROR IS NOT A BONA FIDE PURCHASER.

This is the position taken by us in our argument in chief; hence, the assumption of counsel that it is conceded that the Bank is a *bona fide* purchaser, is unauthorized.

These bonds and coupons were purchased, it is true, by the Bank before they were due, but they were purchased with constructive notice of the defense.

The Board of Supervisors are, by statute, required to keep a full and complete record of their proceedings; and such record is, by law, made constructive notice.

Dillon on Munic. Corp., 1st Ed., Sec. 372.
Baltimore v. Eschbach, 18 Md., 276.
Baltimore v. Reynolds, 20 Md., 1.
Hodges v. Buffalo, 3 Comst., 430.
Thomas v. Richmond, 12 Wallace, 349.
Bissell *et al.* v. City of Kankakee, 64 Ill., 249.

The records of the county contain no order authorizing the issuing of the bonds and coupons in question; neither do they purport upon their face to have been issued by the Board of Supervisors.

Treadwell v. Commissioners, 11 Ohio St., 192-3.

In the original argument upon the question of the *bona fide* of the Bank, it was stated that the fact that the bonds bore date subsequent to the taking effect of our present constitution, was, of itself, enough to put the party on inquiry.

This doctrine is asserted in the case of *Bailey v. Taylor*, 5 Mass., 285, and *Marshall Co. v. Cook*, 38 Ill., 57.

To assume that the Bank was a *bona fide* holder, and that their title to the paper is therefore to be protected, because they were in point of fact ignorant of the fraud of the

county officers, is but saying that a party may acquire rights by his own remissness and neglect and may wilfully shut his eyes against the truth when spread before him and insist in a Court of Justice that he had no knowledge of its existence.

Mussey v. Beecher, 3 Cush., 519.

A purchaser of negotiable paper is chargeable with knowledge of such facts as might be ascertained by the exercise of ordinary diligence and understanding.

Rupert *et al.* v. Mark, 15 Ill., 542.
Morrison v. Kelley, 22 Ill., 624.
McConnell v. Reed, 4 Scam., 123.
Merrit v. Wallace, 19 Ill., 486.

THE AUTHORITY OF THE COUNTY OFFICERS TO BIND THE COUNTY.

Under an authority so peculiar and limited it is not to be presumed that one would deal with the county officers or purchase the bonds without first searching the records. If they should, it is because they had full confidence in the honesty and integrity of the county agents, and to this extent the purchaser trusts the county agent, and if he is deceived by him he has no right to complain of the principal. It is the purchaser, and not the county, who trusts the agent beyond the express limits of the power conferred upon the agent, and therefore the maxim that where one of two innocent persons must suffer, he who reposes confidence in the wrongdoer must bear the loss, operates in favor of the county, and not in favor of the purchaser of the bonds.

Mussey v. Beecher, 3 Cush., 519.
Parsons v. Amour, 3 Peters, 428.
Stainer v. Tyson, 3 Hill, 279.
Atwood v. Munnings, 7 Barn. & Cress., 278.

In the case of *Lowell Five Cents Savings Bank v. The Inhabitants of Winchester*, 8 Allen, 109, where the inhabitants of a town, by a vote to borrow a certain sum of money for a specified purpose, and to give the note of their treasurer therefor, and the treasurer executed the authority, the town was held not liable upon a note given by him, in their name, for money subsequently borrowed by him and converted to his own use, although he assumed to be acting under the authority conferred upon him, and the lender supposed that he was doing so.

In delivering the opinion of the court, it is said: "The principal is not to be held bound by an act of the agent which exceeds the authority vested in him, if the authority is conditional or dependent upon the existence of some fact. Whoever deals with the agent must see to it that the condition is fulfilled, or that the requisite facts exist on which the authority to bind the constituent depends."

See, also, to the same effect:

Grant v. Norway, 10 C. B., 65.
Coleman v. Riches, 16 C. B., 104.
Hubersty v. Ward, 8 Exch., 330.
Merchants Bank, &c., v. N. Y. & N. H. R. R. Co., 3 Kernan, 599.
Schooner Freeman v. Buckingham, 18 How., 182.

Even if we give full effect to the resolutions as they appear of record, it will be found that they utterly fail to show that these bonds were issued by virtue of an order or resolution passed by the Board of Supervisors.

The resolutions, as entered, did not authorize the chairman and clerk to issue the bonds.

The resolution of December, 1869, provided that the chairman of the Board of Supervisors should issue and deliver to the railroad company the bonds whenever the railroad company should have completed and equipped their line of railway through the county of Moultrie. Who was to determine when this was done? Certainly not the chairman of the Board of Supervisors.

The power of determining this question is by the charter conferred upon the entire Board, and they alone had authority to issue the bonds. In the exercise of this authority they might appoint the chairman of the Board, or any other member, to sign the bonds; but they could not, and did not, appoint an agent to determine that the railroad company had complied with the conditions that entitled them to the bonds.

Clark v. Board of Supervisors, 27 Ill., 309.

We, however, insist that the Board of Supervisors never passed the resolution of December, 1869, as the same appears of record.

The circuit court finds that some kind of an informal resolution was passed by the Board of Supervisors to the

effect that the county would subscribe $80,000 to the capital stock of the Decatur, Sullivan & Mattoon Railroad Company, and that the resolution be referred to John R. Eden to put in form, and that the Board of Supervisors never took any further action upon it, nor in any manner sanctioned or approved it.

The resolution, as prepared by Eden, was not recorded until the spring or summer of 1870, and probably not until after the new constitution went into effect.

THE BOARD OF SUPERVISORS COULD NOT DELEGATE THEIR AUTHORITY.

It is insisted by counsel for the Bank, that the resolution, as prepared by Eden, bound the county, because it is said "that the Board acted through its own chosen and authorized agent, and tested by all the rules of agency, why should the county not be bound by the form given its resolution by its own agent?"

There is a conclusive answer to this argument, and that is, that the Board of Supervisors themselves are the agents of the county, and where a duty is conferred upon them by law, as in this case, they have no power to delegate their authority.

Dillon on Munic. Corp., 1st Ed., Sec. 60.
Thompson v. Schermerhorn, 6 N. Y., 92.
Ruggles v. Collyer, 43 Mo., 359.
Day v. Green, 4 Cush., 333.
Coffin v. Nantucket, &c., 5 Cush., 269.

Smith v. Morse, 2 Cal., 524.
Oakland v. Carpenter, 13 Cal., 540.
East St. Louis v. Weehrung, 50 Ill., 28.

COUNTY SUBSCRIPTION.

It is admitted by counsel for the Bank, in their argument, that if the subscription was not made until after the new constitution went into effect, that the Board of Supervisors had no authority to make it, and that their act is *ultra vires*; but it is contended that the informal resolution passed by the Board of Supervisors constituted a subscription, and in support of that position, the case of *Clark Co., v. The Paris, Kentucky River & Winchester R. R. Co.*, 11 B. Monroe, 143, and the case of *Nugent v. The Supervisors, &c.*, 19 Wallace, 241, are cited as supporting that doctrine.

In the last case the court held that, to constitute a a subscription by a county to stock in a railroad company, it is not necessary that there be an act of chirographical subscribing. A resolution of the county declaring a subscription made, and an acceptance of such subscription by the railroad company, and notice to the county of such acceptance, the delivering to the railroad company by the proper county officers, of the county bonds, and acceptance by the county of the corresponding stock, voting as a stockholder and levying a tax to pay the interest on the bonds, estop the county (*assuming that it had a legal right to subscribe*) from denying its subscription.

The case at bar is entirely unlike either of the cases cited by the defendant in error. Here there was no sub-

scription or pretence of subscription until July, 1871, and until after the new constitution went into effect.

The case in 11 B. Monroe, was one where the resolution was spread upon the records and stood as a continuous proposition until it was accepted by the railroad company; but who would doubt that before it was accepted it was in the power of the county authorities to have withdrawn it? It is the proposition for subscription, and the acceptance of it by the railroad company, that constitutes a subscription.

The informal resolution was, that the county would subscribe $80,000 in addition to the capital stock of the Decatur, Sullivan & Mattoon railroad company. By reference to the special findings it will be seen that it was a simple resolve that the Board would subscribe, and not a subscription; and that resolve was put an end to by the prohibition contained in the new constitution before there was an acceptance of it by the railroad company.

But the case in 11 B. Monroe is not supported by the weight of authority, and is in direct conflict with

Aspinwall v. the County of Davies, 22 How., 378.
The Land Grant R. R. & Trust Co. v. the County of Coffee, 6 Kansas, 245.
The People ex. rel. v. the County of Tazewell, 22 Ill., 152.
Board of Commissioners v. Louisville R. R. Co., 39 Ind., 192.
The Terre Haute, &c., R. R. Co. v. Sankey, 42 Ind., 402.
Pittsburg R. R. Co. v. Gazzan, 32 Penna. St., 340.
The Toledo Bank v. Bond, 1 Ohio St., 657.

There are two answers to the position assumed that the Brink & Conant contract constitutes an acceptance on the part of the railroad company.

1. The resolution in regard to subscription was not entered of record at the time of the making of that contract.

2. The circuit court based no special finding upon that contract, and there is no finding by the circuit court that a subscription was ever made by the Board of Supervisors of Moultrie county to the stock of the Decatur, Sullivan & Mattoon Railroad Company.

By the stipulation of the parties, embodied in the record, as well as by the rules and practice of the court, the case must be decided upon the special findings of the circuit court, and not upon the evidence. And the special findings are that the subscription was made on the 13th of July, 1871, and more than a year after the new constitution took effect.

THE ISSUING OF THE BONDS TO THE CONSOLIDATED COMPANY.

On page 18 of the record the circuit court specially finds that on the 30th day of April, 1872, the Decatur, Sullivan & Mattoon Railroad Company was consolidated with the Chicago and Illinois Southern Railroad Company, by the joint action of the board of directors of said companies, and that the Supervisors of Moultrie county NEVER AUTHORIZED the issuing of the bonds to the consolidated company.

Upon this finding two questions are presented:

First. Was the consolidation legal, and did it entitle the consolidated company to the bonds?

Sec. 11 of the constitution of 1870 provides that no railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a parallel or competing line, and in no case shall any consolidation take place except upon public notice given at least 60 days, to all stockholders, in such manner as may be provided by law.

Art. 11, Sec. 11, title, Railroads.

That the directors have no authority to consolidate, and that it must be done at a stockholders' meeting, is settled by the authorities.

Edmund *et al.* v. Bowman *et al.*, 58 Ill., 444.
Railroad Co., v. Allerton, 18 Wallace, 234.
Fisher v. Evansville, &c., R. R. Co., 7 Porter (Ind.), 407.
Keen v. Johnson, 1 Stock. ch., 405.
2 Redf. R. R., 575.

Second. Even if the consolidation was legal, the clerk and chairman had no authority to issue the bonds to the consolidated company without a previous order or resolution of the Board of Supervisors, and the circuit court specially finds that no order or resolution was ever passed authorizing the issuing of the bonds to the consolidated company, and *a fortiorari* to any other company.

THE RECITALS IN THE BONDS.

It is claimed by counsel for the Bank that plaintiff in error is estopped from questioning the authority of the chairman and clerk of the Board of Supervisors, by reason of the recitals in the bonds, and cite in support of that position the case of *Knox County v. Aspinwall*, 21 How., 539.

That case, when examined, will be found not to be in conflict with the position which we have assumed.

The court say the main ground of defense set up and relied on to defeat the recovery is that the defendant, the Board of Commissioners, POSSESSED NO AUTHORITY to execute or authorize to be executed the bonds and coupons in question; hence they are obligations not binding upon the county of Knox, which this board represents. "Our chief inquiry, therefore, will be whether or not these several obligations were executed and put into circulation as evidence of indebtedness, by competent and legal authority."

It is evident from the whole tenor of the decision that if the court had found that there was no authority to issue the bonds, the recitals in them would have been unavailing.

THE ISSUING AND VOTING OF THE RAILROAD STOCK.

The position assumed by opposing counsel that the stock of the railroad company was issued and delivered to the county clerk, is wholly untenable.

The county clerk was at the time, as shown by the findings of the court, president of the railroad company, and as such president he issued the stock of the Decatur, Sullivan & Mattoon Railroad Company, and retained it in his own possession without the knowledge or consent of the board of supervisors. The pretense is that he issued it as president of the railroad company and retained it as clerk; but the extraordinary feature of the case is that he should issue $80,000 of the stock of Decatur, Sullivan & Mattoon railroad company, after the consolidation and after that company ceased to have an existence, according to the theory of opposing counsel.

Again, it is said by opposing counsel that the act of Titus in making a subscription of the stock in 1871, was unauthorized and illegal.

And yet it is claimed that in consequence of such illegal act and his voting the stock, he bound the county. Such a position is too absurd to require further comment.

HENRY & PENWELL and JOHN R. EDEN,

Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 532.

THE COUNTY OF MOULTRIE, PLAINTIFF IN ERROR,

vs.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit pro tempore, sole judge of said circuit court, on Saturday, the twenty-fifth day of July, in the June term of said court, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independance the ninety-ninth year.

J. A. JONES, *Clerk.*

ROCKINGHAM TEN-CENTS SAVINGS-BANK,
v.
COUNTY OF MOULTRIE. } Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS:

Be it remembered that heretofore, to wit, on the twenty-first day of of May, in the year of our Lord one thousand eight hundred
2 and seventy-four, the said plaintiff, by Messrs. Cullom, Scholes, and Mather, its attorneys, filed in the office of the clerk of the circuit court of said district its declaration herein, which said declaration is in the words and figures following, to wit:

Declaration.

Circuit court, June term, A. D. 1874.

UNITED STATES OF AMERICA,
Southern District of Illinois:

Rockingham Ten-Cents Savings-Bank, a corporation under the laws of the State of New Hampshire, and located and doing business therein, plaintiff, complains of the county of Moultrie, a corporation existing under the laws of the State of Illinois, and located therein, to wit, in the southern district of said State, the defendant, of a plea of trespass on the case on promises, for that whereas the defendant, on, to wit, the first day of January, eighteen hundred and seventy-three, at, to wit, the said southern district of Illinois, made its twenty-four certain coupons in writing, one in the words and figures following, to wit:

$80. $80.

3 The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 41, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 42, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first
4 day of Jan'y, A. D. 1874, on bond No. 43, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 44, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 45, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

5 And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 46, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 48, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80

6 The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, 1874, on bond No. 49, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 50, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first

7 day of Jan'y, A. D. 1874, on bond No. 51, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y A. D. 1876, on bond No. 59, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 60, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

8 And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 61, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 62, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following:

$80. $80.

9 The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 63, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 64, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80 $ 80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due
10 the first day of Jan'y, A. D. 1874, on bond No. 65, for $1,000.

JOHN A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the

sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 66, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 67, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

11 And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 68, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other order in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 69, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

12 $80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the *the* annual interest due the first day of Jan'y, A. D. 1874, on bond No. 70, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80

The county of Moultrie, State of Illinois, will pay to the bearer the

sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 71, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And one other in the words and figures following, to wit:

$80. $80.

The county of Moultrie, State of Illinois, will pay to the bearer
13 the sum of eighty dollars, at the office of the Farmers' Loan and Trust Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 75, for $1,000.

J. A. FREELAND,
Chairman Board of Supervisors.
A. N. SMYSER, *Clerk.*

And said plaintiff avers that said coupons, on the day and year in this count first above mentioned, were duly delivered by said defendant, and that they afterwards, to wit, on the same day and year, to wit, at said district, came to the possession of plaintiff as owner and bearer thereof, and that he is still in the possession thereof as such owner and bearer; by reason whereof the said defendant became liable to pay to said plaintiff the said sums of money in said coupons mentioned according to the tenor and effect thereof, and being so liable the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place first above written, undertook and faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sums of money in said coupons mentioned according to the
14 tenor and effect thereof, yet the said defendant hath not paid said coupons or any or either of them, or any part thereof, although often requested so to do.

2D COUNT.—And whereas also the defendant, a body corporate situate in said district, on, to wit, the first day of March, A. D. 1874, at, to wit, said southern district of Illinois, was and still is indebted to the plaintiff in the sum of twenty-five hundred dollars for money before that time paid, laid out, and expended by the plaintiff for the use of the defendant, at its request; and in the further sum of twenty-five hundred dollars for so much money before that time lent and accommodated by the plaintiff to the defendant at its request; and in the further sum of twenty-five hundred dollars for so much money before that time had and received by the defendant to the use of the plaintiff; and in the further sum of twenty-five hundred dollars for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and in the further sum of twenty-five hundred dollars for so much money before that time due from the defend-
15 ant to the plaintiff for interest upon and for the forbearance of divers large sums of money before then due from the defendant to the plaintiff and by the plaintiff forborne to the defendant for long spaces of time before then elapsed, at the request of the defendant, whereby the defendant became liable to pay the plaintiff the said several sums of money when it should be requested; and the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money to the plaintiff on request; yet the defendant has not, though often requested, paid the said several sums of money, nor either of

them, nor any part thereof, to the damage of the plaintiff of twenty-five hundred dollars; wherefore he brings suit.

By his attys,

CULLUM, SCHOLES & MATHER.

(Indorsed:) Filed May 21, A. D. 1874. J. A. Jones, clk.

Afterwards, to wit, on the twenty-sixth day of said May of the
16 year aforesaid, came the defendant, by Messrs. Eden and Henry, its attorneys, and filed in the clerk's office of said court its first, second, and third pleas herein pleaded, which said first, second, and third pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court, to the June term, A. D. 1874.

THE COUNTY OF MOULTRIE
ats.
ROCKINGHAM TEN-CENTS SAVINGS-BANK.

FIRST PLEA.—The county of Moultrie, by Eden and Henry, attorneys, comes and defends, when, &c., and says that it did not undertake and promise in manner and form as the plaintiff hath above thereof complained against it; and of this the defendant puts itself upon the country.

EDEN & HENRY,
Def.'s Attys.

SECOND PLEA.—And for a further plea in this behalf defendant
17 says actio non, because it says that it did not make and execute the said coupons in said declaration mentioned; and of this it puts itself upon the country, &c.

EDEN & HENRY,
Def.'s Attys.

THIRD PLEA.—And the defendant for a further plea in this behalf says actio non, because it says that said plaintiff ought not to maintain its action thereof against said defendant, because it says that there is not, nor on the day of the commencement of this suit, nor ever since, was there in existence any such corporation called the Rockingham Ten-Cents Savings-Bank, as by the said writ and declaration is above supposed; and of this the defendant is ready to verify, &c.

EDEN & HENRY,
Def.'s Attys.

(Indorsed:) Filed May 26, 1874. J. A. Jones, clk.

Then afterwards, to wit, on the twenty-fifth day of July of the
18 year last aforesaid, comes the defendant, by its said attorneys, and tenders to the court its bill of exceptions herein, which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA,
State of Illinois:

United States circuit court, southern district of Illinois, June term, A. D. 1874.

ROCKINGHAM TEN-CENTS SAVINGS-BANK
vs.
THE COUNTY OF MOULTRIE. } Asst.

And now again come the parties, and the court, after hearing the evidence and the argument of counsel, specially finds the facts upon which the judgment in said cause is rendered, as follows: That a charter was granted by the general assembly of the State of Illinois to the Decatur, Sullivan and Mattoon Railroad Company, approved March 26th, 1869.

Charter.

"The State of New Hampshire, in the year of our Lord one thousand eight hundred and sixty-seven.

"An act to incorporate the Rockingham Ten-Cents Savings-Bank.

"Be it enacted by the senate and house of representatives in general court convened—

"SECTION 1. That Aaron H. Hills, George W. Tucker, Benjamin Cheever, Jonathan Dearborn, John W. Parsons, John S. Rand, Samuel H. Goodall be, and they are hereby, constituted a corporation by the name of the Rockingham Ten Cents Savings Bank, to be located in the city of Portsmouth, and they and such others as shall be duly elected members of said corporation at the annual meetings thereof, according to such by-laws as may hereafter be established, shall be and remain a body politic and corporate by said name, and shall be vested with all the powers and privileges and subject to all the liabilities of corporations of a similar nature.

"SECTION 2. That for the purpose of enabling industrious persons of all descriptions to invest such parts of their earnings as they can conveniently spare in a safe and profitable manner, the said corporation shall receive on deposit sums as small as ten cents, and not exceeding the sum of five hundred dollars, of any one depositor, his wife, or minor children, and shall use and improve all deposits for the benefit and advantage of the person or persons by or for whom the sums shall be respectively deposited, and the net increase and profits of all deposits of money received by said corporation shall be paid out and distributed in just proportions among the several persons by or for whom the said deposits shall have been made, agreeably to such reasonable rules and by-laws as may be established by said corporation, and the amount of such deposits may be withdrawn at such times and in such manner as said corporation shall direct and appoint.

"SECTION 3. Said corporation shall be capable of receiving and holding such building and real estate as shall be necessary and convenient for managing its affairs: Provided, Such real estate held at any one time for such purposes shall not exceed in value, at the time of the purchase or acceptance thereof by said corporation, the sum of ten

thousand dollars; and the said corporation shall be further allowed to take, hold, and dispose of any real estate whatever which may be
21 mortgaged or pledged for the security of its loans or debts due it, or which may be conveyed to or taken by said corporation in satisfaction of debts, demands, or liabilities which have been previously contracted or incurred: And provided further, That of the gross amount of deposits in said bank, at least the sum of forty per cent. shall be loaned upon real-estate securities in this or some other of the New England States, or on notes of individuals with sufficient sureties or good collaterals.

"SECTION 4. Said corporation shall not make and issue any bill or promissory note to circulate as currency, and the president and members of said corporation shall receive no compensation for their services in said savings-bank, or derive any emoluments therefrom: Provided, however, That a reasonable allowance may from time to time be made to their treasurer or secretary and agents necessarily employed in transacting the business of said corporation; and the books and accounts of said corporation shall be open at all times to the inspection of
22 the governor of the State, of the bank commissioners, of any justice of the supreme judicial court, or a committee appointed for that purpose by either branch of the legislature.

"SECTION 5. No officer or member of said corporation shall borrow any portion of said deposits, or become indebted to the same, except the treasurer by his bond.

"SECTION 6. The officers of said corporation shall consist of a president, a treasurer, who shall give bonds for the faithful discharge of his duties in such sums as the bank commissioners may from time to time determine; provided that said sum shall not be less than twenty-five thousand dollars; and provided further, that said sum shall not be changed oftener than once a year; a secretary, and not less than five directors or trustees, and such other officers as may be requisite for managing the affairs of the institution, which officers shall be elected by ballot, shall hold their office for one year, and until others are chosen and have accepted office in their stead, and shall be sworn to the faithful performance of the duties of their offices respectively.

23 "SECTION 7. Said corporation shall have power to make such by-laws as are necessary and proper for the management of the affairs of the institution: Provided, however, That they are not repugnant to the constitution and laws of the State.

"SECTION 8. Whenever any deposit shall be made by any minor, the trustees of said corporation may, in their discretion, pay to such depositor such sums as may be due to him or her, although no guardian shall have been appointed for such minor, or the guardian shall not have authorized the drawing of the same; and the check, receipt, or acquittance of such minor shall be as valid as if the same was executed by the guardian of said minor or said minor was of full age, if such deposit was made personally by said minor.

"SECTION 9. At the expiration of twenty years from the passage of this act the concerns of the institution shall be closed by an equitable distribution of all the property of the same among the depositors in proportion to the respective amounts of their deposits and
24 the time they have respectively continued the same in the institution.

"SECTION 10. Aaron H. Hills, George W. Tucker, and Benjamin Cheever are hereby authorized to call the first meeting of said corporation by giving a personal notice of the time and place of such meeting

to each of the corporators herein named, or by leaving a like notice at the place of abode of each at least ten days before the day of such meeting.

"SECTION 11. The legislature may alter, amend, or repeal this act, and the same shall take effect from and after its passage.

"S. G. GRIFFIN,
"*Speaker of the House of Representatives.*
"WILLIAM T. PARKER,
"*President of the Senate.*

"Approved July 5, 1867.

"WALTER HARRIMAN,
"*Governor.*"

And that the persons named in said charter as directors, in 1869, met and temporarily organized by electing a president and secretary
25 pro tem.; that no stock was subscribed at that time on the books of company and no regular meeting of stockholders held by said railroad company until the 13th day of July, 1870, for the purpose of electing a board of directors to succeed the one named in charter; that at said time books of subscription were opened, some stock was subscribed thereon.

The court further specially finds that on the 16th day of December, A. D. 1869, the board of supervisors of Moultrie County, Illinois, defendant, passed some kind of informal resolutions to the effect that the county of Moultrie would donate to the Decatur, Sullivan and Mattoon Railroad Company the sum of seventy-five thousand dollars that had been previously authorized by a vote of the legal voters of said county, and that they would subscribe eighty thousand dollars in addition to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, and that said resolutions be referred to John R. Eden, an attorney, to put in form before the same should be recorded on the records of said board of supervisors; that afterwards, in the spring or
26 summer of 1870, A. N. Smyser, the county clerk of said county of Moultrie, without any further action or direction of the board of supervisors aforesaid, entered upon record the following orders or resolutions:

Orders of board supervisors.

December special meeting, A. D. 1869.

"The board of supervisors of Moultrie County, Illinois, met pursuant to adjournment, at the court-house in Sullivan, in said county, on Tuesday, the 14th day of December, A. D. 1869, at 1 o'clock, p. m.

"Present: J. Meeker, of Sullivan, ch'n; Alex. Porter, of Lovington; Wm. Armantrout, of Whitley; J. T. Taylor, of East Nelson; M. H. Warren, of Jonathan Creek; Chas. A. Reeves, of Lowe; W. P. McGuire, of Marrowbone; & Jesse Wright, of Dory; A. N. Smyser, clk.; S. W. Wright, shff.

"The board was called to order by the chairman, J. Meeker, at 1 o'clock p. m.

* * * * * * *

"The following orders, pledging the county to subscriptions and donations for railroad purposes, were then presented by Wm. P.
27 McGuire, adopted, and ordered spread upon the records, and are as follows, to wit:

"Whereas on the 17 day of August, A. D. 1869, over twenty-five legal

voters of the county of Moultrie did present to the county clerk of said county (of Moultrie) a written application, requesting that an election should be held in said county, in pursuance of an act entitled "An act to incorporate the Decatur, Sullivan & Mattoon Railroad Company," to determine whether said county of Moultrie should make a donation of seventy-five thousand dollars to said Decatur, Sullivan and Mattoon Railroad Company, to aid in the construction of a railroad to be built by said company in pursuance of their said charter; such donation to be paid in the bonds of said county of Moultrie; the same to be delivered to said company when said railroad should be completed in good running order through said county of Moultrie and the cars running thereon; said bonds to be due in ten years from the issue and delivery thereof as aforesaid to said company or its duly-authorized agents, and to draw interest, to be paid annually, at the rate of
28 eight per cent. per annum;

"And whereas afterwards, to wit, on the 17th day of August, A. D. 1869, the clerk of the county court of said county of Moultrie, in obedience to said application and in pursuance of said act of incorporation, did receive and file said application and forthwith proceeded to post printed notices of an election to be held by the legal voters of said Moultrie County, at the usual places of holding elections in said county, at four of the most public places in each town or election-district of said county, said election to be held on the second day of November, A. D. 1869; which said notices were posted as aforesaid more than thirty days preceding said election, as set forth in said written application for the holding thereof;

"And whereas on said second day of November, A. D. 1869, an election was held in said county of Moultrie, in pursuance of said written application and notices and the act aforesaid, and the same was conducted and return thereof made as provided by law;

And whereas a majority of all the votes cast at such election was in favor of donating said sum of seventy-five thousand dollars to
29 the Decatur, Sullivan and Mattoon Railroad Company for the purposes aforesaid and upon the terms and conditions aforesaid:

"Therefore it is ordered by the board of supervisors of Moultrie County that, in order to carry out the wishes of the people as expressed by their said votes, there be donated by the said county of Moultrie to the Decatur, Sullivan and Mattoon Railroad Company the sum of seventy-five thousand dollars, upon the terms and conditions set forth in the application for said election.

"And it is further ordered, that when said company shall have completed their said railroad through the said county of Moultrie, in accordance with their said charter, and put the same in good running order, and caused trains of cars to be running over and upon said railroad by the motive-power of steam, there be issued and delivered to said railroad company bonds of the county of Moultrie in such denominations as said company may require, due and payable ten years after the date thereof, with interest payable thereon annually at the rate
30 of eight (8) per cent. per annum, to the amount of seventy-five thousand dollars, and that the same be countersigned by the clerk of the county court of said county.

"And it is further ordered by the board of supervisors of Moultrie County that, under and by virtue of the authority conferred upon said board by an act approved March 26th, A. D. 1869, entitled "An act to incorporate the Decatur, Sullivan and Mattoon Railroad Company," the county of Moultrie subscribed to the capital stock of the Decatur, Sul-

livan and Mattoon Railroad Company the sum of eighty thousand dollars to aid in the construction of a railroad by said company, in pursuance of their charter.

"And be it further ordered by the board of supervisors aforesaid that, when said railroad shall be 'open for traffic' between the city of Decatur and the town of Sullivan aforesaid, there be issued eighty thousand dollars of the bonds of said county, in denominations of not less than five hundred dollars, payable to said company, drawing interest, to be paid annually, at the rate eight per cent. per annum; the principal to be due and payable ten years after date, or sooner,
31 at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid.

"And it is further ordered, that the chairman of the board of supervisors of said county shall issue and deliver to said railroad company the bonds aforesaid whenever the said railroad company shall have completed and equipped their said line of railway through the said county of Moultrie.

"On motion, the board adjourned till first Tuesday in March, A. D. 1870.

"Attest:

"A. N. SMYSER, *Clerk.*

"STATE OF ILLINOIS,
"*County of Moultrie, ss:*

"I, George Hetherington, clerk of the county court in and for the county of Moultrie aforesaid, do certify that the foregoing is a true copy of the records of the proceedings of the board of supervisors of the aforesaid county.

"Given under my hand and official seal, at my office in Sullivan, this 12th day of June, A. D. 1874.

[L. S.] "GEO. HETHERINGTON, *Clerk.*"

32 The court further specially finds from the evidence that no subscription was in fact made by the board of supervisors aforesaid upon the books of said railroad company until the month of July, 1871, when the same was made by Joseph Titus, chairman of said board of supervisors, without any express authority from said board of supervisors, for the purpose of enabling said Titus to vote at an election then being held by said company.

The court further specially finds from the evidence that the said John R. Eden did prepare said resolutions, and that, after they were so prepared by the said John R. Eden as aforesaid from certain minutes furnished the said John R. Eden by the chairman of said board of supervisors, the said A. N. Smyser, then clerk of said board of supervisors and president of said railroad company, without any authority from said board of supervisors, added on the record of said order or resolution, and without the knowledge and consent of the said Eden, the following:

33 "And it is further ordered that the chairman of said board of supervisors of said county shall issue and deliver to said railroad company the bonds aforesaid whenever the said railroad company shall have completed and equipped their said line of railway through the said county of Moultrie."

And said resolution, with the addition of the said Smyser as aforesaid, was by said Smyser spread upon the records of said board of supervisors as aforesaid. And the court further specially finds from the evi-

dence that said resolutions, after the same had been reduced to legal form by the said Eden and returned to the clerk, Smyser, and by him placed on record, were never thereafter read over at any subsequent meeting of said board of supervisors donating the seventy-five thousand dollars and subscribing the eighty thousand dollars.

The court further specially finds from the evidence that at the December term, A. D. 1872, of the board of supervisors of said county, a resolution was passed and entered upon the records of the board of supervisors of said county, as follows:

Resolution of board of supervisors.—(Record, page 181.)

34 "In December meeting of the board of supervisors, A. D. 1872, of Moultrie County, 2d day.

"The following resolution respecting railroads was then on this day presented to the board by (supervisor) Wm. P. McGuire, read, considered, and adopted, in words and figures following, to wit:

"Ordered by the board, that a committee of three be appointed by the chairman to examine the records of subscriptions of railroad donations by the county, and examine the roads upon which said donations are donated, with and under the advice of legal counsel; and, after and upon such examination upon such railroads as are legally entitled to said donations, they shall recommend the delivery of bonds so due, and upon others, if any, that the county bonds are not legally due or payable, they shall so report. Further, that upon the report being made on all such roads as may be found legally entitled to bonds, the chairman of this board, on its behalf, in connection with the county clerk, shall execute, issue, and deliver to said parties Moultrie County bonds in
35 the sum and at the rate of interest as their authority for their issue by a vote of the people authorizes or as provided for by law.

"The above order was passed by the following vote, viz: Ayer, Phillips, McGuire, Miller, Ward, Dougherty, and Freeland—6; Hetherington and Kinney absent. Noes none.

"In accordance with the foregoing order, the chairman appointed as said committee Messrs. McGuire, Ward, and Phillips.

"STATE OF ILLINOIS,
"*Moultrie County, ss:*

"I, George Hetherington, clerk of the county court of the county aforesaid, do hereby certify that the foregoing is a true copy from the record of the board of supervisors of said county.

"Given under my hand and official seal, at Sullivan, this 12th day of June, A. D. 1874.

[L. S.] "GEO. HETHERINGTON, *Clk.*"

That under this resolution a committee of three was appointed by the board of supervisors of said county, in accordance with said resolution, and that said committee made a report to the chairman of said board of supervisors, John A. Freeland, who was at the time a director
36 in said railroad company, which report was filed in the county clerk's office, of date December 26th, 1872, and said report of said committee is as follows:

Report of committee.

"To the chairman of the board of supervisors of Moultrie County:

"Your committee, appointed at the December term, A. D. 1872, of the board, to examine the record of subscription of the railroad donations by

the county, &c., 'under the advice of legal counsel,' &c., with authority to report in reference to such as 'they find not legally due and payable,' report that they have examined such records fully and the law governing such cases, under the advice of legal counsel, and find that the first reference made to railroad subscriptions by the board of supervisors was at the January special term, A. D. 1868. At that term a motion was made 'that, in pursuance of the vote of the people of Moultrie County, at an election held at the several places of holding general elections in said county, on the first day of July, A. D. 1867, an order be made to subscribe seventy-five thousand dollars to the capital stock of the St. Louis,
37 Shelbyville and Detroit Railroad Company for the county of Moultrie, &c. The consideration of the question was postponed until the March term, A. D. 1868. At the March term the order was voted down. At the September meeting, A. D. 1868, of the board of supervisors an order was passed, 'that an election be held in Moultrie County for the purpose of determining as to whether the county of Moultrie will subscribe eighty thousand dollars to the capital stock of the St. Louis, Shelbyville, and Detroit Railroad Company, and also to determine whether the said county will subscribe the sum of eighty thousand dollars to the capital stock of the Grayville, Mattoon, Decatur and Pekin Railroad Company, and also to determine whether the said county will subscribe forty thousand dollars to the capital stock of the Paris and Decatur Railroad Company, upon certain conditions; and, provideda majority of legal voters of said county shall declare in favor of subscribing said stock to each of said companies as aforesaid, then this board will immediately meet and subscribe said stock as aforsesaid; but in no case will this subscribe said stock to one company with-
38 out subscribing to the other; that said election be held on the day of the general election in November, A. D. 1868; and provided further, that the eighty thousand to be voted for at said election for the said St. Louis, Shelbyville and Detroit Railroad Company shall be in lieu of the seventy-five thousand dollars heretofore voted by the voters of said county to said company.' An election was held in pursuance of the order of the board, to determine whether the county would subscribe the several amounts specified to the three designated railroads, and each proposition received a majority of the votes cast, but it is believed that neither of them received a majority of the whole vote of the county. Under the election held pursuant to the said order of the board, the Paris and Decatur Railroad Company claim of the county forty thousand dollars of its bonds. Is the county under any legal obligations to said company to pay the bonds claimed under an election held upon such conditions?

"The Paris and Decatur Railroad Company can claim only un-
39 der the general railroad law, there being no authority given in its charter for counties or other municipalities to vote subscriptions or other aid to said company. This is no longer an open question, the supreme court having settled the question in the year 1859, and ever since adhered to its decision. In the case of Supervisors of Fulton County vs. Mississippi and Wabash Railroad Company, 21st Illinois 338, the very question we are no' considering, was decided by the supreme court. Judge Breese, in giving the opinion of the court, says: 'The order made by the board of supervisors of Fulton County under this law does not seem to be in conformity to it. The law evidently contemplates a vote for or against subscription to some one company only, specifying the company. The order is for a subscription o the Mississippi and Wabash River Railroad Company and the Sprin -

field and Petersburg Railroad Company, seventy-five thousand dollars to each. * * * This is not only not pursuant to the law, but is manifestly unfair, * * * A single isolated measure, such as a railroad,
40 may not unite a majority of a county to whom it is proposed * * * Is it fair, in order to accomplish this object, to attach another measure to it, to be voted on at the same time, which may benefit the opposing portion of the county? The law never intended that two roads should be coupled together, and the people forbidden to vote for one if they did not also vote for the other, the one road being really a bribe offered for votes for the other. * * * We do not hesitate to say the proposition to vote on two roads at the same time was not authorized by the law and is a fraud on the people.' This decision is re-affirmed by our supreme court in 22d Illinois and in numerous cases since that time. The vote being illegal, the question arises, ought the board to issue the bonds because of some real or imaginary obligation toward the company constructing a railroad through the county on the line indicated by the vote? It may be contended by some persons that the county is guilty of the crime of repudiation for refusing to issue the bonds in such
41 case. The fair presumption is that the company constructing the road did so, relying wholly upon other support, and not depending in any manner upon a subscription by Moultrie County in pursuance of such illegal vote. We may also assume that the county acted without reference to any supposed liability growing out of said illegal vote in making at a later period very liberal appropriations to aid in the construction of railroads through the county. It is a notorious fact that many persons did vote for such subsequent appropriations from a knowledge of the fact that the vote under the order referred to was illegal, and a reasonable supposition that business men would not expend their money, relying upon aid voted by the county under an election held by the supreme court to be illegal. Had the voters of the county supposed that they would be called upon to issue bonds under the illegal vote referred to, they would doubtless have refused to vote the large donations that were afterwards made by the county. In this view of the case we do not hesitate to say, in the language of the
42 supreme court, that were the board to issue the bonds claimed by the Paris and Decatur Railroad Company, it would be a fraud on the people of the county. We therefore recommend the adoption of the following resolution:

"Resolved, That Moultrie County not being legally bound to issue bonds to the Paris & Decatur Railroad Company, therefore it is ordered by the board that application made for forty thousand dollars of the bonds of Moultrie County on behalf of the Paris and Decatur Railroad Company be rejected.

Resolved further, That we do not regard the county as being liable to pay any of the appropriations or issue any bonds to either of the three railroad cos. voted for under the order of the board of supervisors at the September term, A. D. 1868, and that the board will not pay anything or issue any bonds under the same.

"And your committee further report, that upon examination of the subscription of the sum of $80,000, under an act of the general assembly of the State of Illinois approved March 26th, 1869, to aid in the
43 construction of the Decatur, Sullivan and Mattoon Railroad, since consolidated with the Chicago and Illinois Southern Railroad Company, they have employed legal counsel and find said subscription to be in accordance with law; that they, as a committee, have passed over said road from Sullivan to Decatur, and find said road constructed

and the iron laid, but find a portion of the road not surfaced as it should be. They found the bridges good and substantial structures, the road well tied, and the track laid with good T-rails, but not sufficiently spiked. We would therefore recommend you that whenever you receive notice in writing that said road between Sullivan and Decatur is ready for traffic, that you issue and deliver to Charles A. Tuttle, the legal representative of said Decatur, Sullivan and Mattoon Railroad Co., the sum of $80,000 in Moultrie County bonds, of the denomination and rate of interest authorized by said subscription, and that upon delivery of the same you take from said C. A. Tuttle a receipt in full for all de-
44 mands of said company against said Moultrie County in favor of said road. All of which is respectfully submitted.

"Sullivan, Dec. 25th, 1872.

"W. P. McGUIRE, *Chm.*
"H. P. PHILLIPS.
"RIAL WARD.

"STATE OF ILLINOIS,
"*Moultrie County, ss:*

"I, Geo. Hetherington, county clerk in and for said county of Moultrie, do hereby certify that the foregoing is a true and correct copy of a certain instrument of writing found and now in my office, but not appearing of record in my office.

"Given under my hand and official seal this the 20th day of June, A. D. 1874.

[L. S.] "GEO. HETHERINGTON,
"*Co. Clerk.*"

The court further specially finds that at the time said committee was appointed and at the time of making said report, the said supervisor McGuire was also an agent in the employment of said company.

The court further specially finds from the evidence that before the issuing of the bonds hereinafter mentioned a notice was served on the said Smyser and Freeland, as follows:

45 *Notice from railroad co. to Moultrie Co. clerk.*

"HORACE HAYWARD, *President, Olney, Ills.* H. T. NASH, *Auditor, Mattoon, Ills.*
JOHN HUTCHINS, *Vice " Cleveland, O.* W. BINGHAM, } *Ex. Committee.*
G. L. INGERSOLL, *Treasurer, Cleveland, O.* JOHN HUTCHINS, }
J. A. FULLER, *Secretary, Cleveland, O.* G. L. INGERSOLL, }

"CHICAGO & ILLINOIS SOUTHERN R'Y.

"GENERAL SUPERINTENDENT'S OFFICE.

"M. L. SAUNDERS, *General Superintendent.*

"MATTOON, ILLS., *Dec. 30th*, 1872.

"A. N. SMYSER, Esq.,
"*County Clerk, Moultrie Co., Ills.*

"DR. SIR: You are hereby notified that the Chicago and Illinois Southern Railway, formerly the Decatur, Sullivan and Mattoon Railroad, is open and ready for traffic between Sullivan and Decatur, and also between Mattoon and Decatur, and that trains will run between the above-mentioned points.

"Very resp'y, yours,

"M. L. SAUNDERS,
"*Genl. Supt.*"

And the court further specially finds from the evidence that upon the making of said report of said committee, and after the receipt of
46 said notices by said Freeland, chairman, and Smyser, clerk, from Saunders, superintendent, and without further action of the board of supervisors of said county, the chairman, who was at the time one of the directors of said company, and the clerk of said board of supervisors, who was at the time president of said railroad company, issued eighty bonds, with coupons attached of like tenor and effect, of the denomination of one thousand dollars each.

Moultrie Co. bond.

UNITED STATES OF AMERICA,
State of Illinois:

"No. 35.] [$1,000.

"Eight per cent. bond, county of Moultrie.

"The county of Moultrie, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Moultrie promises to pay to the Chicago and Illinois Southern Railway Company, or to the bearer hereof, at the office of the Farmers' Loan and Trust Company, in the city of New York, ten years from the first day of January, A. D. 1873, or sooner, at the option of said Moultrie County, with inter-
47 est from the first day of January, A. D. 1873, at the rate of eight per cent. per annum, payable annually at the office of said Farmers' Loan and Trust Company, upon the presentation and delivery of the several interest-coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said county of Moultrie are irrevocably pledged."

(On face in red ink:) $1,000.

"This bond is one of a series of eighty, numbered from one to eighty inclusive, of the denomination of one thousand dollars each, and all of like tenor and date, issued by the said county of Moultrie in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the general assembly of the State of Illinois approved March 26th, A. D. 1869, entitled "An act to incorporate the Decatur, Sullivan and Mattoon Railroad Company;" the said Decatur, Sullivan and Mattoon Railroad Company, and
48 the Chicago and Illinois Southern Railroad Company, having on the sixth day of May, A. D. 1872, filed articles whereby the said companies became consolidated under the name and style of Chicago and Illinois Southern Railway Company, whereby and by virtue of the said act of incorporation of said Decatur, Sullivan and Mattoon Railroad Company all the rights, powers, and privileges of said last-named company became vested in the said Chicago and Illinois Southern Railway Company.

"In witness whereof the chairman of the board of supervisors and the county clerk of said Moultrie County have hereunto set their hands and caused the seal of said county to be affixed this 31st day of December, A. D. 1872.

[SEAL.] "ALFRED N. SMYSER, *Clerk.*

"JOHN A. FREELAND,
"*Chairman of the Board of Supervisors.*

"$80. *Coupon.* $80.

"The county of Moultrie, State of Illinois, will pay to the bearer the sum of eighty dollars, at the office of the Farmers' Loan and Trust
49 Co., in the city of New York, being the annual interest due the first day of Jan'y, A. D. 1874, on bond No. 35, for $1,000.

"J. A. FREELAND,
"*Chairman Board of Supervisors.*

"A. N. SMYSER, *Clerk.*"

Which said bonds, when so issued, were delivered to Isaac Keys, who was representing the contractors of the railroad company, to whom the railroad company had previously by order on their records directed these bonds and coupons, when executed, to be delivered, and the said bonds and coupons were afterwards, for a valuable consideration, bought by the plaintiff before their maturity, said plaintiff having no notice of any defence to the same. The court further specially finds from the evidence that Decatur, Sullivan and Mattoon Railroad was not completed between the city of Decatur and the town of Sullivan at the time said bonds were issued, but that said railroad was so far completed as to enable the cars of the Decatur, Sullivan and Mattoon Railroad Company to run into the city of Decatur on the track of the Illinois Central Rail-
50 road Company, which fact was well known to the said Freeland and Smyser at the time said bonds were issued, it requiring several thousand dollars to complete said railroad, so as to open the same for traffic between the city of Decatur and the town of Sullivan aforesaid. But that said Decatur, Sullivan and Mattoon Railroad Company had such arrangements with the Illinois Central Railroad that they were authorized to use said Illinois Central track a short distance before going into Decatur, and thereby had their road open for traffic from Decatur to Sullivan before the issuing of said bonds and coupons.

The court further specially finds that some time before said bonds were issued, stock of said Decatur, Sullivan and Mattoon Railroad Company to the amount of eighty thousand dollars was signed by the president and secretary of said railroad company, (the said Smyser and Freeland;) that the same never was delivered to said board of supervisors, but held by said Smyser as county clerk.

51 The court further specially finds from the evidence that the Decatur, Sullivan and Mattoon Railroad Company, through its board of directors, on the 30th day of April, A. D. 1872, consolidated with the Chicago and Illinois Southern Railroad Company, through its board of directors, and filed articles of consolidation, said consolidated company being the Chicago and Illinois Southern Railway Company; said consolidation being by the mutual consent of the directors of each of said company, and that said consolidation was legally made.

The court further specially finds from the evidence that the board of supervisors of the county of Moultrie never authorized the issuing of said bonds to the consolidated company, except by the resolutions aforesaid, but that the said chairman and clerk of said board of supervisors issued said bonds payable to the said Chicago and Illinois Southern Railway Company, and delivered the same to the said Isaac Keys as aforesaid, and that there is now due on the coupons offered in evidence, which were attached to said bonds, the sum of two thousand nine hundred and nine dollars and fifty cents.

52 The court further specially finds from the evidence that the plaintiff is a corporation, and has power under its charter to sue

and be sued, &c., and that plaintiff and defendant filed with the clerk of said court a written stipulation that the defendant withdraw all his pleas except the first, second, and third, and that the defendant may, under the general issue, offer in evidence at the trial all matters of defence which it might or could offer in evidence under such pleas so withdrawn, or under any other pleas well pleaded, and of which the plaintiff is given due notice a reasonable time before trial; and by consent of both parties it was agreed that said cause might be tried and determined by the court, and that the plaintiff might, under the declaration already filed, offer in evidence all and any Moultrie County coupons belonging to the eighty thousand dollars of Moultrie County bonds which the plaintiff might have and might wish to have the court pass judgment upon on said trial of the above-entitled cause; and that the defendant might make the same defence as to such additional
53 coupons so offered in evidence as the defendant has the right to do under the pleas filed to the declaration, or as agreed in the stipulation, with the privilege of making any additional defence which defendant has to said coupons.

The plaintiff further offered in evidence a contract in words and figures following, to wit:

Contract.

"This agreement made this fifteenth day of April, 1870, between the Decatur, Sullivan and Mattoon Railroad Company, of the State of Illinois, the first part, and P. C. Brink, of Philadelphia, and J. Edwin Conant, of the city of New York, of the second part, and their associates, assignes, administrators, and executors, witnesseth: That the said party of the second part hereby agrees and contracts to construct, complete, and equip, for the party of the first part, a railroad which, when completed and equipped, shall be owned and operated by the said party of the second part from a point in the city of Mattoon, in the county of Coles, where the Chicago and Illinois Southern Railroad crosses and intersects the track of the Indianapolis and St. Louis Railroad in
54 or near said city of Mattoon, and thence to the town of Sullivan, in the county of Moultrie, and State of Illinois; thence to the village of Bethany, in said county of Moultrie, and thence to the city of Decatur, Wheatland, or South Macon, in the county of Macon, and State of Illinois, provided the sum of $100,000 shall be donated or subscribed as stock to said company by the said counties, towns, or cities, in which case Decatur shall be made a point, together with all necessary side-tracks, station-houses, water-tanks, and turn-tables, so as to make a first-class railroad in all respects, for and in consideration of the sum of $325,000 in bonds, at the times and in the manner as hereinafter mentioned, to be paid and delivered to said party of the second part by the said party of the first part, in bonds of the cities, towns, and counties along said line in the manner as hereinafter provided to be paid, payable at such times and places, and bearing such rates of interest as has been or may be provided by the corporate authorities of such cities, towns, and counties in their respective orders, directing the issue of such bonds and conditions upon which such sums were severally voted, and which said orders are made a part of this agreement; and it is expressly understood
55 that no bonds are to be paid and delivered to the party of the second part until they shall have complied with all of said orders and requirements of said cities, towns, and counties in relation to said bonds and to the issue of the same, and no bond shall be paid or delivered to

said party of the second part until they have completed and equipped so much of said road for which they may demand bonds; also in further consideration, in payment to said party of the second part, shall receive the capital stock of said company and such amounts of first-mortgage bonds to be issued per mile as the party of the second part shall deem necessary. There shall be sufficient and suitable culverts and crossings at all public roads and water-ways. It is further agreed that said party of the second part shall commence the work on said road and furnish all the materials, rails to be T pattern not less than 45 lbs. per lineal yard, fish-plate fastenings, necessary as herein provided for, and fully construct and complete and equip said railroad ready for use to the corporate limits of the town of Sullivan aforesaid from the city of Mattoon
56 within 14 months from the first day of June, 1870, and to the village of Bethany in said county of Moultrie in 16 months from the said first day of June, and thence to the city of Decatur, in the county of Macon, and State of Illinois, on or before the 31st day of December, 1871, in case the said county of Macon or the towns upon the line or the city of Decatur shall, within 4 months from the date hereof, subscribe stock and make donations to the capital stock of said company the sum of one hundred thousand dollars in eight per cent. bonds, payable upon the completion of said road to the city of Decatur; provided, however, that in case of the failure of the county of Macon aforesaid, or the towns and cities therein, to subscribe or donate the one hundred thousand dollars aforesaid, such failure shall in nowise invalidate any part of this contract so far as require the building, completing, and operating of said road from the city of Mattoon to the line between the counties of Moultrie and Macon in the direction of Decatur from the village of Bethany. If, however, Macon County or the towns therein declines, the franchises shall be transferred to the party of the second part; provided further,
57 that the whole line, or so much thereof as has been or may hereafter be provided for by donations or subscriptions as heretofore mentioned, shall be fully completed and in operation with all suitable station-houses and rolling-stock within two years from June 1st, A. D. 1870; and in case the said party of the second part shall fail or neglect to complete and equip said portions of said road, as herein stipulated, within two years from June the 1st, 1870, as herein mentioned, then they shall forfeit all work done or materials furnished to the use of the said party of the first part, and shall also forfeit all right under this agreement, and the same shall become absolutely null and void; provided such forfeiture shall not result if the party of the first part shall fail to deliver said bonds as herein provided, to wit, Mattoon township bonds, $40,000, to be delivered upon completion of said road from the city of Mattoon to the Moultrie County line, as aforesaid, and the Sullivan township bonds, $30,000, eight per cent., upon the completion of the road to the corporate limits to the town of Sullivan, in said Moultrie County, with the trains run-
58 ning thereon from Mattoon, conditioned that said bonds are due and payable only on the condition that the road herein named shall be the first one in operation from any railroad point to said town of Sullivan, and one hundred and fifty-five thousand dollars of Moultrie County bonds, upon the completion of said road to the Moultrie and Macon County line, in the direction of Decatur from Sullivan, $100,000 of bonds when completed to Decatur, as hereinbefore mentioned. It is further agreed that the party of the second part shall survey and locate the line of said road between the points therein above named as early as the first day of August, 1870, on the most direct and practicable route, so as to avoid, as far as possible, any unnecessary expense to the party of the first part in procuring the right of way; and

it is further agreed that the party of the first part shall at its own expense obtain the right of way between the points aforesaid herein named. And in case the party of the first part shall fail or refuse to furnish depot-grounds, then the party of the second part
59 may select and purchase such grounds as they may deem best, and in further consideration in construction, stock shall be placed in the hands of a trustee or trustees appointed by the parties of both parts, said stock to be voted in person or by proxy, and to be paid to the party of the second part, as the superstructure and grading shall be done, in the proportion which the whole bears to $800,000 of stock, which amount of stock shall be fixed on the distance of forty miles, and which stock may be in excess of that represented by the several donations; but as the conditions of said donations are fulfilled, said stock representing the same shall be likewise transferred and paid over. Said party of the first part shall cause first-mortgage bonds to be issued as the party of the second part shall require, in further consideration of construction, to the amount of not exceeding $19,000 per mile. And the party of the second part shall select one or more trustees. Said bonds to be used only for the purchase of iron, locomotives, cars or other material, or constr'ng or operating said road. In making up the
60 board of directors, said party of the second part shall have the right of nominating seven directors, who shall be elected in accordance therewith. In consider of the party of the first part surrendering the selection of a majority of the directors of this co. to the parties of the second part, and the further consideration of the said party of the second part obtaining control of said company by the issuing of stock in accordance with the terms of this contract, it is further agreed that the contract for building said road shall not be charged, except with the concurrence of a majority of the directors residing along the line of the road, until said road shall be completed. It is agreed by the directors of said party of the first part that all the acts, charters, votes, grants, or subsidies are in due form of law and valid. Any difference arising between the parties from any cause shall be referred to three disinterested persons, one of whom shall be selected by each party and the two thus chosen shall select a third, and the decision of two of whom shall be final and binding upon both parties hereto. In the event of the parties
61 of the second part not commencing work within six months, said party of the first part may declare this contract forfeited.

"In testimony whereof the said Decatur, Sullivan and Mattoon Railroad Company, by its president, by order of the board, hereunto affixes its hand and seal.

"Decatur, Sullivan & Mattoon R. Road Company,
"By LEONIDAS CHAPIN, [SEAL.]
"*Pres't pro tem.*

"Countersigned by Alfred N. Smyser, sec'y p. t. D., S. & M. R. R. Co.

"And also in testimony whereof the said parties of the second part have hereunto affixed their hands and seals the day and year above written.

"P. C. BRINCK. [SEAL.]
"J. EDWIN CONANT & *Associates*,
"By P. C. BRINCK.

"Witness:
"A. A. TAYLOR.
"WM. P. MCGUIRE.
"DOUTY PATTERSON.
"J. MEEKER."

To the introduction of which the defendant objected; objection overruled; contract admitted in evidence; to which ruling the defendant excepted.

Judgment.

62 It is therefore ordered and adjudged by the court that the plaintiff have and recover of the defendant its damages so by it sustained as aforesaid by reason of the promises of the defendant aforesaid, assessed by the court at the sum of twenty-nine hundred and nine dollars and fifty cents, and that execution issue therefor.

Thereupon the defendant prayed an appeal to the Supreme Court of the United States, which is granted upon the defendant entering into bond in the sum of six thousand dollars, with Thomas Noble, John Millizen, Charles S. Roane, and Joseph E. Eden as security, by the first day of November next. And thereupon the defendant tenders its bill of exceptions, which is signed and ordered to be made part of the record.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed July 25, 1874. J. A. Jones, clerk.

63 Then afterwards, on said twenty-fifth day of July of the year aforesaid, came again the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation herein; which said certain stipulation is in the words and figures following, to wit:

Stipulation.

It is hereby stipulated and agreed that no formal objection shall be considered by the Supreme Court of the United States in the determination of this cause on either side, but that said cause shall be decided on its merits, as presented by the special findings aforesaid.

CULLOM, SCHOLES & MATHER,
Attys. for Plff.
EDEN & HENRY,
Attys. for Deft.

(Indorsed:) Filed July 25, 1874. J. A. Jones, clerk.

Now, afterwards, to wit, on the tenth day of October of the year last aforesaid, came again the defendant, and filed in said clerk's office its bond herein, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

ROCKINGHAM TEN-CENTS SAVINGS-BANK
vs.
THE COUNTY OF MOULTRIE. } Assumpsit.

64 Know all men by these presents, that we, the County of Moultrie, as principal, and Thomas Noble, John Millizen, Charles L. Roane, and Joseph E. Eden as sureties, of the State of Illinois, are held and firmly bound unto the Rockingham Ten-Cents Savings-Bank in the

sum of six thousand dollars, to be paid to the said Rockingham Ten-Cents Savings-Bank, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally and firmly, by these presents. Sealed with our seals and dated this 10th day of October, A. D. 1874.

Whereas the above-named county of Moultrie hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named county of Moultrie shall prosecute its said appeal to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full
65 force and virtue.

THE COUNTY OF MOULTRIE, [L. S.]
By ALFRED SCOTT,
Chairman and Attorney in Fact.
THOMAS NOBLE. [L. S.]
JOHN MILLIZEN. [L. S.]
CHARLES L. ROANE. [L. S.]
JOSEPH E. EDEN. [L. S.]

STATE OF ILLINOIS,
Moultrie County, ss:

Thomas Noble, John Millizen, Charles L. Roane, and Joseph E. Eden make oath and say, that they are sureties on the foregoing bond, and that they are each worth the sum of six thousand dollars, after the payment of all their debts and liabilities, in real and personal property not exempt from execution, situate in the county and State aforesaid.

THOMAS NOBLE,
JOHN MILLIZEN,
CHARLES L. ROANE,
JOSEPH E. EDEN.

Subscribed & sworn to before me this 10th day of October, A. D. 1874.
[L. S.] GEO. HETHERINGTON,
Co. Clerk.

Approved.

S. H. TREET, *Dist. Judge.*

(Indorsed:) Filed October 10th, A. D. 1874. J. A. Jones, clerk.

66 Circuit court of the United States.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

I, J. A. Jones, clerk of the circuit court of the United States for the southern district of Illinois, do hereby certify the foregoing to be a true and correct copy of the declaration, 1st, 2nd, and 3rd pleas, and all the papers specified and referred to in the bill of exceptions, together with a certain stipulation and bond of appeal in a certain cause wherein Rockingham Ten-Cents Savings-Bank is plaintiff and the County of Moultrie is defendant, as the same appear of file in my said office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield, in said district, this fifth day of December, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] J. A. JONES, *Clk.*

67 The appellant, the County of Moultrie, complains that error has intervened in the foregoing record and proceeding, and that said errors are in these:

1. The court erred in rendering judgment for appellee and against appellant after finding specially that no subscription was made by appellant to the Decatur, Sullivan and Mattoon Railroad Company until after the first day of January, A. D. 1871, and until after the new constitution of the State of Illinois went into effect.

2. The court erred in rendering judgment for appellee and against appellant after specially finding that the board of supervisors of said county passed only an informal resolution that they would make a subscription to the Decatur, Sullivan and Mattoon Railroad Company, and referred the informal resolution to the Hon. John R. Eden to put in form, said informal resolution not being recorded on the books of said county nor authorized to be recorded.

3. The court erred in rendering judgment in favor of appellee and
68 against appellant after specially finding that the resolution that appears of record on the records of said county was placed there without authority of the board of supervisors of said county.

4. The court erred in rendering judgment in favor of appellee and against appellant after specially finding that said subscription was never authorized to be made by said board of supervisors.

5. The court erred in rendering judgment in favor of appellee and against appellant after specially finding that the only authority the Decatur, Sullivan and Mattoon Railroad Company had for consolidating their stock with the Chicago and Illinois Southern Railroad Company was the joint action of the board of directors of said companies, said bonds having been issued by the chairman and clerk of said board of supervisors to said consolidated company, instead of to the Decatur, Sullivan and Mattoon Railroad Company.

69 6. The court erred in rendering judgment in favor of appellee and against appellant after specially finding that the board of supervisors of said county never authorized their chairman or clerk to issue said bonds to said consolidated railroad company.

7. The court erred in holding that appellant was estopped from questioning the jurisdiction or authority of the chairman and clerk of said board of supervisors to issue said bonds by the recitals contained in said bonds.

For these several errors aforesaid appellant prays that said cause may be reversed and such judgment entered in the Supreme Court as should have been entered in the circuit court had no error intervened.

HENRY & PENWELL,
Attorneys for Appellant.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the Rockingham Ten-Cents Savings-Bank, plaintiff, and the county of Moultrie, defendant, a manifest error hath happened, to the great damage of the said county of Moultrie, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID DAVIS,
Asso. Justice.

71 The United States of America to the Rockingham Ten-Cents Savings-Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the county of Moultrie is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David Davis, associate justice of the Supreme Court of the United States, this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

DAVID DAVIS,
Asso. Jus.

72 I hereby acknowledge service of the within citation this 5th day of June, 1875, and also enter the appearance of the Rockingham Ten-Cents Savings-Bank, defendant in error.

S. M. CULLOM,
Atty. for Defdt. in Error.

73 Know all men by these presents, that we, , are held and firmly bound unto the Rockingham Ten-Cents Savings-Bank in the full and just sum of six thousand dollars, to be paid to the said Rockingham Ten-Cents Savings-Bank, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a circuit court of the United States for the southern district of Illinois, in a suit depending in said court between the Rockingham Ten-Cents Savings-Bank, plaintiff, and the county of Moultrie, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error, and filed a copy

thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Rockingham Ten-Cents Savings-Bank citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said county of Moultrie shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE COUNTY OF MOULTRIE, [L. S.]
By ALFRED R. SCOTT,
Chairman and Attorney in Fact.
JOEL FREEMAN. [L. S.]
AB. PATTERSON. [L. S.]
G. W. VAUGHAN. [L. S.]
WILLIAM ELDER. [L. S.]

Sealed and delivered in presence of—
GEO. HETHERINGTON, *Co. Clk.*

Approved by—
(Signed) DAVID DAVIS,
Asso. Justice.

74 STATE OF ILLINOIS,
Moultrie County, ss:

We, the undersigned, securities for the county of Moultrie and obligors in the foregoing bond, on oath say that we are each worth more than the sum of six thousand dollars in real and personal property not exempt from execution after the payment of all our just debts and liabilities.

(Signed) JOEL FREEMAN.
" AB. PATTERSON.
" G. W. VAUGHAN.
" WILLIAM ELDER.

Subscribed & sworn to before me this 17th day of March, 1875.
[SEAL.] (Si'g'd) GEO. HETHERINGTON,
County Clerk.

(Indorsement on cover:) No. 532. The County of Moultrie, plaintiff in error, vs. The Rockingham Ten-Cents Savings-Bank. S. Illinois C. C. U. S. Filed 8th June, 1875.

ABSTRACT AND BRIEF.

Supreme Court of the United States.

NO. 532.

THE COUNTY OF MOULTRIE, PLAINTIFF IN ERROR,

VS.

THE ROCKINGHAM TEN CENTS SAVINGS-BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

HENRY & PENWELL, AND JOHN R. EDEN,
FOR PLAINTIFF IN ERROR.

Commercial Steam Print, Danville, Ill.

UNITED STATES OF AMERICA.

Supreme Court of the United States,

NO. 532.

THE COUNTY OF MOULTRIE,
vs.
THE ROCKINGHAM TEN CENTS SAVINGS BANK.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

ABSTRACT OF RECORD.

R Page 18 This is an action of assumpsit brought on coupons amounting in the aggregate to the sum of Twenty-nine hundred and fifty-nine dollars and fifty cents.

R Page 7 The plaintiff in error pleaded the general issue *non est factum* and *nul tiel* corporation, and the parties filed with

the Clerk of said court a written stipulation that the defendant may, under the general issue, offer in evidence at the R Page 19 trial all matters of defense which might or could be offered under pleas well pleaded, and that the cause might be tried and determined by the court, and that the plaintiff might under the declaration offer in evidence all coupons belonging to the eighty thousand dollars of Moultrie county bonds, which the plaintiff might have, and wish to have the court pass judgment upon.

R Page 8 The cause was tried by the court, and the court specially found the following facts: that a charter was granted by the General Assembly of the State of Illinois to the Decatur, Sullivan and Mattoon Railroad Company, approved March 26th, 1869, and that the persons named in said charter as directors met and temporarily organized by electing a president and secretary *pro tem*; that no stock was subscribed at the time on the books of the company, and no regular meeting of stockholders held by said railroad company until the 13th day of July, 1870, and that at that R Page 10 time books of subscription were opened and some stock was subscribed thereon.

R Page 10 That on the 16th day of December, 1869, the board of supervisors of Moultrie county, Illinois—defendant, passed some kind of informal resolutions to the effect that the county of Moultrie would donate to the Decatur, Sullivan and Mattoon Railroad company, the sum of seventy-five thousand dollars, that had been previously authorized by a vote of the legal voters of said county, and that they would subscribe eighty thousand dollars in addition to the capital stock of the Decatur, Sullivan and Mattoon railroad company, and that said resolutions be referred to John

R. Eden, an attorney, to put in form before the same should be recorded on the records of said board of supervisors. That afterwards, in the spring or summer of 1870, A. N. Smyser, the county clerk of said county of Moultrie, without any further action or direction of the board of supervisors aforesaid, entered upon the records the following order or resolutions :

R Page 11 Orders of Board of Supervisors, December special meeting, A. D. 1869: "And it is further ordered by the board of supervisors of Moultrie county, that, under and by virtue of the authority conferred upon said board by an act approved March 26th, A. D. 1869, entitled 'An act to incorporate the Decatur, Sullivan and Mattoon Railroad Company,' the county of Moultrie subscribed to the capital stock of the Decatur, Sullivan and Mattoon Railroad company, the sum of eighty thousand dollars to aid in the construction of a railroad by said company in pursuance of their charter.

"And be it further ordered by the board of supervisors aforesaid, that when said railroad shall be open for traffic between the city of Decatur and the town of Sullivan aforesaid, there be issued eighty thousand dollars of the bonds of said county, in denominations of not less than five hundred dollars, payable to said company, drawing interest, to be paid annually, at the rate of eight per cent. per annum; the principal to be due and payable ten years after date, or sooner, at the option of the county, and that said bonds be delivered to said railroad company in full payment of the subscription of said county, so made as aforesaid.

R Page 11 "And it is further ordered that the chairman of the board of supervisors of said county shall issue and deliver

to said railroad company the bonds aforesaid whenever the said railroad company shall have completed and equipped their said line of railway through the said county of Moultrie."

R Page 12 That no subscription was in fact made by the board of supervisors aforesaid, upon the books of said railroad company until the month of July, 1871, when the same was made by Joseph Titus, chairman of said board of supervisors, without any express authority from said board of supervisors, for the purpose of enabling the said Titus to vote at an election then being held by said company.

R Page 12 The court further specially finds from the evidence that the said John R. Eden did prepare said resolutions, and that after they were so prepared by the said John R. Eden as aforesaid, from certain minutes furnished the said John R. Eden by the chairman of said board of supervisors, the said A. N. Smyser, then clerk of said board of supervisors, and president of said railroad company, without any authority from said board of supervisors, added on the record of said order or resolution, and without the knowledge and consent of the said Eden, the following:

R Page 12 "And it is further ordered that the chairman of the board of supervisors of said county shall issue and deliver to said railroad company the bonds aforesaid, whenever the said railroad company shall have completed and equipped their said line of railway through the said county of Moultrie."

R Page 12 And said resolution, with the addition of the said Smyser as aforesaid, was by said Smyser spread upon the records of said board of supervisors as aforesaid. And the

court further specially finds from the evidence, that said resolutions, after the same had been reduced to legal form by the said Eden and returned to the clerk, Smyser, and by him placed on record, were never thereafter read over at any subsequent meeting of said board of supervisors, donating the seventy-five thousand dollars and subscribing the eighty thousand dollars.

R Page 13 The court further specially finds from the evidence that at the December term, A. D. 1872, of the board of supervisors of said county, a resolution was passed and entered upon the records of the board of supervisors of said county, as follows :

Resolution of Board of Supervisors—"Ordered by the board that a committee of three be appointed by the chairman to examine the records of subscriptions of railroad donations by the county, and examine the roads upon which said donations are donated, with and under the advice of legal counsel, and after and upon such examination upon such railroads as are legally entitled to said donations, they shall recommend the delivery of bonds so due, and upon others, if any, that the county bonds are not legally due or payable, they shall so report.

"Further, that upon the report being made on all such roads as may be found legally entitled to bonds, the chairman of the board on its behalf, in connection with the county clerk, shall execute, issue and deliver to said parties Moultrie county bonds in the sum and at the rate of interest as their authority for their issue by a vote of the people authorizes as provided by law."

R Page 13 Under this resolution a committee was appointed,

which made a report to the chairman of the board of supervisors. John A. Freeland was at the time a director of said railroad company, which report was filed in the county clerk's office of the date of December 26th, 1872.

And which report so far as the subscription of the eighty thousand dollars is concerned, is as follows:

R Page 15 "And your committee further report, that upon examination of the subscription of the sum of $80,000, under an act of the general assembly of the State of Illinois, approved March 26th, 1869, to aid in the construction of the Decatur, Sullivan and Mattoon Railroad, since consolidated with the Chicago and Illinois Southern Railroad company, they have employed legal counsel, and find such subscription to be in accordance with law. That they as a committee have passed over said road from Sullivan to Decatur, and find said road constructed, and the iron laid, but find a portion of the road not surfaced as it should be. They found the bridges good and substantial structures, the road well tied, and the track well laid with good T rails, but not sufficiently spiked. We would therefore recommend you that whenever you receive notice in writing that said road between Sullivan and Decatur is ready for traffic, that you issue and deliver to Charles A. Tuttle, the legal representative of said Decatur, Sullivan and Mattoon Railroad company, the sum of $80,000 in Moultrie county bonds of the denomination and rate of interest authorized by said subscription, and that upon delivery of the same you take from said C. A. Tuttle a receipt in full for all demands of said company against Moultrie county in favor of said road. All of which is respectfully submitted."

R Page 17 And upon the making of said report of said committee, and after the receipt of notice by Freeland, chairman, and Smyser, clerk, from Sanders, superintendent, and without further action of the board of supervisors of said county, the chairman, who was at the time one of the directors of said company, and the clerk of said board of supervisors, who was at the time president of said railroad company, issued eighty bonds with coupons attached, of like tenor and effect, of the denomination of one thousand dollars each, which bonds were of the tenor following:

R Page 17 "The county of Moultrie, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Moultrie promises to pay to the Chicago and Illinois Southern Railway Company, or to the bearer hereof, at the office of the Farmers' Loan and Trust Company, upon the presentation and delivery of the several interest coupons hereto annexed, as they respectively become due, and to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said county of Moultrie are irrevocably pledged."

R Page 17 (On face in red ink.) $1,000.

"This bond is one of a series of eighty, numbered from one to eighty inclusive, of the denomination of one thousand dollars each, issued by the said county of Moultrie in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the Board of Supervisors of said county of Moultrie, in December A. D. 1869, in conformity to the provisions of an act of the general

assembly of the State of Illinois, approved March 26, A. D. 1869, entitled:

"*An Act to incorporate the Decatur, Sullivan and Mattoon Railroad Company.*"

"The said Decatur, Sullivan and Mattoon Railroad Company, and the Chicago and Illinois Southern Railroad Company, having, on the sixth day of May, A. D. 1872, filed articles whereby the said companies became consolidated under the name and style of Chicago and Illinois Southern Railway Company, whereby and by virtue of the said act of incorporation of the Decatur, Sullivan and Mattoon Railroad Company, all the rights, powers and privileges of said last named company became vested in the said Chicago and Illinois Southern Railway Company.

"IN WITNESS WHEREOF, The chairman of the Board of Supervisors and the County Clerk of said Moultrie county, have hereunto set their hands and caused the seal of said county to be affixed, this 31st day of December, A. D. 1872.

[Seal] ALFRED N. SMYSER, Clerk."

JOHN A. FREELAND, *Chairman of the Board of Supervisors.*"

R Page 18

Which bonds, and so issued, were delivered to Isaac Keys, representing the contractors of the railroad company, who had authority to receive them from the railroad company.

The court further specially finds that the Decatur, Sullivan and Mattoon railroad company, on the thirtieth day of April, 1872, was consolidated with the Chicago and Illinois

Southern railroad company, by the joint action of the boards of directors of said companies, and that the supervisors of Moultrie county never authorized the issuing of the bonds to the consolidated company, and that the plaintiff as a corporation, has power under its charter to sue and be sued. The court found on this state of facts for the plaintiff and rendered judgment for the sum of twenty-nine hundred and nine dollars and fifty cents.

R Page 22

STIPULATION.

It is hereby stipulated and agreed that no formal objections shall be considered by the Supreme Court of the United States in the determination of this cause on either side, but that the said cause shall be decided on its merits as presented by the special findings as aforesaid.

CULLOM, SCHOLES & MATHERS, Atty's for Plaintiff.
EDEN & HENRY, Attorneys for Defendant.

R Page 24

The defendant brings the record into this court and assigns the following errors:

1st. The court erred in rendering judgment for the appellee and against the appellant, after finding specially that no subscription was made by the appellant to the Decatur, Sullivan and Mattoon railroad company until after the first day of January, 1871, and until after the new Constitution went into effect.

2d. The court erred in rendering judgment for the appellee and against the appellant, after specially finding that the board of supervisors of said county passed only an informal resolution that they would make a subscription to the Decatur, Sullivan and Mattoon railroad company, and

referred the informal resolution to the Hon. John R. Eden to put in form, said informal resolution not being recorded on the books of said county, nor authorized to be recorded.

R Page 24 3rd. The court erred in rendering judgment in favor of the appellee and against the appellant, after specially finding that the resolution that appears of record on the records of said county was placed there without authority of the board of supervisors of said county.

4th. The court erred in rendering judgment in favor of the appellee and against the appellant, after specially finding that the said subscription was never authorized to be made by said board of supervisors.

5th. The court erred in rendering judgment in favor of the appellee and against the appellant, after specially finding that the board of supervisors of said county never authorized their chairman or clerk to issue said bonds to said consolidated railroad company.

6th. The court erred in holding that the appellant was estopped from questioning the jurisdiction or authority of the chairman and clerk of the board of supervisors to issue said bonds, by the recitals contained in said bonds.

For these several errors aforesaid, the appellant prays that said judgment may be reversed and such judgment entered in the supreme court as should have been entered in the circuit court, had no error intervened.

HENRY & PENWELL, and JOHN R. EDEN,
Attorneys for Appellant.

HENRY & PENWELL, AND JOHN R. EDEN,
ATTORNEYS FOR PLAINTIFF IN ERROR.

This is an action of assumpsit, brought on coupons of eighty bonds of the denomination of one thousand dollars each, purporting to have been issued by the chairman of the board of supervisors and the county clerk, under the seal of the county.

The authority under which it is claimed that these bonds were issued is the 10th Section of an act of the general assembly of the State of Illinois, entitled "An Act to incorporate the Decatur, Sullivan and Mattoon Railroad Company," approved March 26th, 1869. The 10th Section is as follows:

"The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company to an amount not exceeding eighty thousand dollars, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent. per annum,—said bonds to be issued in such denominations and to mature at such time as said board of supervisors may determine; provided, that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

By the special findings of the circuit court there was no regular organization of the Decatur, Sullivan and Mattoon

Railroad Company until the 13th day of July, 1870, when a meeting of the stockholders was held, a board of directors elected, and books of subscription were opened for the first time. "No subscription was pretended to be made by the county of Moultrie until the month of July, 1871, when the same was made by Joseph Titus, chairman of the board of supervisors, without any express authority from the board of supervisors, for the purpose of enabling him to vote at an election then being held by the railroad company."

Under this state of facts, the first question is as to the legal effect of the constitution of 1870 upon the power of the county to subscribe stock, at that time, under the 10th Section of the act before referred to.

While it may be true that the charter is a contract between the state and the incorporators, and that no law could be passed to impair the legal effect, or deprive the railroad company of any right vested in the company under the charter, can the 10th Section be so construed as to give to the railroad company a vested right to a subscription of eighty thousand dollars, payable in bonds; or was the right at the time of the taking effect of the new constitution an *inchoate* right, and as such, subject to legislative control? It will scarcely be contended that the 10th Section of the act of incorporation imposed a duty that was mandatory upon the board of supervisors. It simply clothed them with a discretionary power that was subject to legislative control.

This question is very ably considered by this court in the case of *Aspinwall v. County of Daviess*, 22 How., 364, in which it was held that when the provisions of a railroad charter made it lawful for certain counties to subscribe for

the stock on a majority vote, and to issue the bonds of the county in payment of such subscription, and on such vote being had, made it the duty of the county commissioners to subscribe for stock and issue bonds therefor. Accordingly, under the provisions of the charter, a vote was taken and resulted in favor of the subscription. After the vote had been taken, but before the subscription was actually made, and the bonds issued, the counties were prohibited by the constitution of the State of Indiana, from subscribing for stock, unless paid for in cash. The circuit court divided in opinion, and this precise question was presented to this court; and it was argued that the provisions in the railroad charter conferring power upon the board of commissioners of the county, and making it their duty to subscribe for stock, and issue bonds therefor, if a majority of the voters of the county should determine at an election in favor of the same, imported a contract with the railroad company on behalf of the State, which is protected by the 10th section of the 1st Article of the Constitution of the United States; which provides that "no State shall pass any law impairing the obligation of contracts; and hence the State constitutional prohibition is inoperative to annul the subscription or the bonds. That this right to the subscription and bonds, resting upon a contract in the charter, is unaffected by any subsequent statute or organic law of the State." The court say, "without stopping to inquire whether or not the power conferred upon the board of commissioners in the charter, and with the conditions therein mentioned constitutes a contract, the court is of opinion that in view of the body upon which the power is conferred, and of the nature of the power itself, no such contract existed, if any, as is contemplated by this clause of the Federal Constitution.

The power or authority contained in the charter, and out of which the right in question is claimed to arise, is conferred upon the county, a public corporation, or civil institution of government, and upon public officers employed in administering its laws; and the power or authority itself concerns this body in its public political capacity."

Chief Justice Marshall observed in *Dartmouth College v. Woodward*, 4 Wheaton, 627, that "the word contract in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions which must change with the circumstances, and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control." But he observes that "the framers of the constitution did not intend to restrain the States in the relation of their civil institutions adopted for internal government; and that the instrument they have given is not to be so construed" (p 629); and Mr. Justice Washington observed in the same case, (p 663) in respect to public corporations which exist only for public purposes, such as towns, cities, &c.: "the legislature may, under proper limitations, change, modify, enlarge or restrain them."

This same question has been twice passed upon by the Supreme Court; once in the case of *Schall et al. v. Bowman et al.*, 62 Ill., 321, and also in the case of *Richards et al. v. Donagho*, 66 Ill., 74. In both cases the charter had been passed and accepted before the taking effect of the new constitution, and in both cases the power was expressly con-

ferred by the charter; yet, notwithstanding that fact, it was held that no corporate subscription could be made in aid of a railway corporation, in pursuance of a vote taken after the constitution of 1870 went into effect, although an election had been called prior thereto for such purpose. See, also, *People v. Coon*, 25 Cal., 635. Dillon, on "Municipal Corporations," uses this language: "Authority given in a railroad charter to a county to take stock and issue bonds therefor, if a majority of the voters so determine, is not a contract, but a mere authority conferred upon the county in its public capacity, and may be repealed at any time before the subscription has been made.

Dillon, M. C., Sec. 42, p. 88.

There are various relations created under the laws and institutions of the State, that bear a stronger resemblance to a contract than section 10 of the charter before referred to, which it is conceded do not fall within the scope and operation of the restrictive clause of the constitution of the United States, in relation to contracts. Marriage is in one sense a contract, often involving in its incidents extensive rights to property and important obligations for the support of the wife, the protection, maintenance and education of children; yet, since the origin of our government, not only this contract, but also the rights and obligations incidental to it, have been subject to legislative control in almost every State in the Union.

So, a law locating the county seat of a newly organized county, at a particular place, on a proposition of the citizens of such a place in case of such location to raise means by private contribution to construct the public buildings for the county, is also in the nature of a contract; yet it cannot be

denied that after the citizens of the place have complied on their part, at great expense to themselves, and also made large investments in property at an advanced price in view of the advantage of such location of the county seat, the legislature may, from considerations of public interest, remove by law such county seat, or repeal even the law creating the county; and thus not only divest the citizens of the place of the advantage of the county seat, but also strip the county officers of the emoluments, special privileges and civil authority conferred by their respective offices.

The People v. The Auditor, 1 Scam., 537.

A license to keep a tavern, or a house of public entertainment, or to maintain a ferry, or to exercise the duties of an auctioneer, or any other license of a similar character authorized by law, are special and exclusive rights and privileges granted by the State, in consideration of stipulated sums of money, and for specified periods of time; and fall within the definition of a franchise, which is nothing more than a liberty to exercise certain special and exclusive privileges withheld from the public at large, and partake of the nature of contracts between the government and the party upon whom the privilege is conferred. Yet the constitutional authority of the legislature to regulate and control these licenses or franchises, with a view to the overruling considerations of the public welfare, is unquestionable.

A law granting a pension to a person, in consideration of public service, is in the nature of a grant or contract; but it is undeniable that such pension may be changed, suspended or abolished by the amendment or repeal of the law. A public office conferring, as it does, a special privilege, and the civil authority to exercise it, bears a close

analogy to a franchise, and is classed by Blackstone as an incorporeal hereditament, and presents the elements of a contract more strongly than the grant of privilege contained in this charter. Yet an officer who has abandoned his business and changed his residence to the injury of his private interests, in order to perform the duties of his public employment, and has in addition thereto entered into bond for the faithful discharge of his duties, may be divested of his right to such office and the emoluments incident thereto, by a repeal of the law creating the office.

Butler v. the State of Penn., 10 How., 402.
The Charleston River Bridge v. The Warren Bridge, 11 Peters, 420.
State of Maryland v. the Baltimore & Ohio R. R. Co., 3 How., 534.
The People v. Morris, 13 Wend., 325.
The Commonwealth v. Bacon, 6 Serg. & Rawle, 322.

A right cannot be regarded as vested unless it is something more than such mere expectation as may be based upon an anticipated continuance of the general law. It must have become a title legal or equitable to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

An act of the legislature cannot be regarded as opposed to the fundamental axioms of legislation, unless they impair vested rights, because most civil rights are derived from public laws, and if, before the right becomes vested in a particular individual or corporation, the convenience of the State, or the policy of the State changes or repeals those laws, the individual has no right of complaint. The power

that authorizes or proposes to give, may always revoke before an interest is perfect in the donee.

Merrill v. Washburne, 1 New Hamp., 213.

The limitation created by the third paragraph of Section 2, Article 14, of the present Constitution of Illinois, is not a limitation upon the franchise of the railroad company, but it is a limitation or prohibition imposed upon the municipalities. Its effect is only incidental upon the chartered powers of the railroad company. It provides that "no county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation or loan its credit in aid of such corporation; *provided*, however, that the adoption of this article shall not be construed as effecting the right of any such municipality to make such subscription where the same has been authorized under existing laws by a vote of the people of such municipality prior to such adoption." It does not prohibit the railroad company, it only prohibits municipalities from entering into certain kinds of contracts. It is wholly prospective; it does no destroy existing rights; it only prohibits municipalities from incurring additional liabilities. The legislature, or the constitutional convention, had full power over municipal corporations. Such corporations are only the creatures of the state government, and parts of the machinery by which the people, as a portion of the government, regulate their police affairs within the rules and subject to the limitations of the Federal Constitution, and are without vested rights.

The People ex rel., v. the Mayor, &c., of Chicago, 51 Ill., 17.
Cooley's Const. Lim., 192, 193, 231, 235, 250.
Field v. The People, 2 Scam., 79.

People v. Reynolds, 5 Gilm., 13.
Shaw v. Dennis, *ib.* 127.
Richland County v. Lawrence County, 12 Ill., 1.
Springfield v. Power, 25 Ill., 187.
Dennis v. Maynard, 15 Ill., 477.
The People v. Ottawa, 48 Ill., 233.
Thomas v. Leland, 24 Wend., 67.
Town of Guilford v. The Supervisors of Chenango County, 3 Kern., 143.
Kirby v. Shaw, 19 Pa. St., 258.
Sharpless v. Mayor, 21 Pa. St., 166.
State v. St. Louis County Court, 34 Mo., 572.
Nicol v. Mayor, 9 Humph., 265.
Mayor v. State, 15 Md., 462.
The People v. Mahoney, 13 Mich., 500.
Montpelier v. —— 27 Vt., 704.
Aspinwall v. Daviess County, 22 How., 377.
People v. Pinkney, 32 N. Y., 377.

Mr. Cooley, in his valuable work on Constitutional Limitations, p 191, says that "the creation of municipal corporations, and the conferring upon them of certain powers, and subjecting them to corresponding duties, does not deprive the legislature of the state of that complete control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries; consolidate two or more into one, overrule their action whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether in the legislative discretion.

The rights and franchises of a corporation being granted for the purpose of the government, can never become such a vested right as against the State, that they cannot be

taken away; nor does the charter constitute a contract in the sense of the constitutional provision, which prohibits the obligation of contracts being impaired. Restraints upon the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates unjustly to individuals, the remedy is not with the courts.

Dartmouth College v. Woodward, 4 Wheaton, 518.
People v. Morris, 13 Wend., 331.
Fries v. Russel, 9 Mo., 507.
McConnel v. Wabash Co., 50 Ill., 69.

This brings us to the consideration of the question:—Was there a valid legal subscription made by the county of Moultrie to the stock of the Decatur, Sullivan and Mattoon Railroad Company, at the time the constitution of 1870 took effect, which was, so far as section 2 of article 14 was concerned, on the 2nd day of July, 1870?

Richards et al. v. Donagho, 66 Ill., 74.
Schall et al. v. Bowman, 62 Ill., 321.

By reference to the special findings of the court, it will be seen that whatever informal resolution with reference to the subscription was passed by the board of supervisors of Moultrie county, at the December special meeting 1869, the same was not recorded, and there is now no record thereof. The court finds that the resolution was referred to John R. Eden to put in legal form, but there is no record of the reference, and the resolution prepared by John R. Eden was not recorded until the spring or summer of 1870, when it was recorded by A. N. Smyser, the county clerk, without any further action or direction of the board of supervisors,

and was never read over or sanctioned in any manner by the board.

The fair inference from the finding of the court is, that the only resolution that was passed by the board of supervisors was one to authorize Eden to prepare a resolution in due form, leaving its adoption, when prepared, to the future action of the board of supervisors; and that the same was not entitled to record until it was ratified and approved by the board. But whether such is the construction to be given to the finding of the court or not is a matter, as we view it, of but slight importance. The order or resolution prepared by Eden certainly will not bind the county beyond what was authorized by the action of the board of supervisors; and as we have before seen, the only thing that the board authorized him to do was to prepare a resolution with reference to *subscription*. Not a word was embraced in the informal resolution with reference to the county issuing bonds, the denomination of such bonds, the length of time they were to run, or the rate of interest that they were to bear. The county authorities certainly had no authority to delegate to Eden the power of determining these questions. This power had been confided to the board of supervisors and they could not delegate it to any other person or tribunal; its exercise was confided to them alone and they only could execute it legally.

Clark v. The board of supervisors of Hancock county, 27 Ill., 309.

Clark v. Cor. of Washington, 12 Wheat., 20, 21.

Dillon Municipal Corp. 1st ed. Sec 60 note 1 cases cited

The fact is, that the order standing alone, even as entered of record, without any acceptance on the part of the railroad company, did not constitute a contract between the

railroad company and the county at the time that the new constitution went into effect. The utmost that can be claimed for the order or resolution is that it amounted to a resolve to subscribe and to issue the bonds of the county. It is but the act of one of the contracting parties. In order to the making of a valid subscription, it was necessary not only that the county should offer to subscribe upon certain terms and conditions, but that the railroad company should agree to and accept the terms offered by the county, before the present constitution went into effect prohibiting such subscriptions, unless previously authorized by a vote of the people of such municipality. This view of the question is fortified by reference to the 5th and 6th sections of the charter, the 5th section of which provides that "said board of directors shall prescribe the manner, time and place of opening books of subscription to said capital stock, the amount thereof to be paid in, and all other regulations that may be deemed necessary concerning the same." Section 6 provides that "the first board of directors shall also prescribe the place and manner of opening books of subscription to the capital stock of said company, and the amounts to be paid in on such subscription."

Independent of these provisions in the charter—what is a subscription? The very term itself imports a writing, and not a mere verbal promise with a verbal acceptance. It has been held that a contract of subscription must be in writing and cannot be established by parol evidence.

Pittsburg R. R. Co. v. Gazzan, 32 Pa. St., 340.
Board of Com. v. Louisville R. R. Co., 39 Ind., 192.
Ryder v. The Alton and Sangamon R. R. Co., 13 Ill., 521, 522.

Tonica and Petersburg R. R. Co. v. Stein,
21 Ill., 98.
The Terre Haute and South-Western R. R. Co.
v. Sankey, 42 Ind., 402.

That this order entered by the county clerk of Moultrie county upon the records of the board of supervisors does not constitute a subscription, is settled by the Supreme Court of Illinois in the case of the *People ex rel. Peoria and Oquawka R. R. Co. v. The County of Tazewell*, 22 Ill., 152. In that case the court says: "Until the county or city has subscribed there is no privity between the county or city and the road. It is the contract of subscription which compels the subscriber of stock to pay his money, and the company to issue him shares of their stock. Until the county subscribes for shares of their stock, the company hold no obligations on the county, and cannot by tendering shares of stock compel them to subscribe, or to issue bonds; nor have they any power to compel the road to issue to them shares of their stock until the subscription is made. It is entirely at the option of the road whether they will permit such subscription. Before the subscription is made no obligation exists between the parties, nor can the vote be treated as an agreement between the county and the road beyond what the law has peremptorily required to be performed.

When the vote was taken and resulted in favor of subscription, it only amounted to a delegation of power to the supervisors to make the contract of subscription as the law then authorized them to do. The company was no party to this vote, and has no more right to insist upon the execution of the power thus delegated, than it would have in case an individual were to authorize an agent to subscribe for

stock in the road, and who should refuse to exercise the power for his principal.

So, also, in the case of *Aspinwall v. The Commissioners of the County of Daviess*, 22 How., 378, *supra*. The court says that the election took place on the first Monday of March, 1849, when a majority of the votes was cast for the subscription. The constitution of Indiana took effect the 1st of November, 1851, but the subscription was not made till the 10th of September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete, when, at the election a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view. It holds that a subscription was necessary to create a contract binding upon the county on one side, to take the stock and pay in bonds, and upon the other, to transfer the stock and receive the bonds for the same. Until the subscription is made the contract is unexecuted and obligatory upon neither party.

In the case of the *Land Grant Railway and Trust Company v. The Board of County Commissioners of Coffee County*, 6 Kan., 245, the court says: "Suppose a railroad company is organized with a capital stock of three hundred thousand dollars, for the purpose of building a railroad from the town of "A" to the town of "B," and one of the counties through which the road is located, without the express con-

sent of the railroad company, votes to subscribe three hundred thousand dollars of stock in said railroad company when the road shall be completed, and the company proceeds under their charter and builds their road, then is the company bound to allow the county to subscribe said stock —which is all there is—and deliver over to the county their charter, their franchises, and all their property? Suppose the company, in the meantime, had sold a portion of their stock to individuals—one-half of it, or the whole of it,—so that the company could not deliver to the county the three hundred thousand dollars of stock. What then? And suppose the stock had advanced, and the bonds had depreciated in value so that the stock was worth the most, would the railroad company then be bound? And if, for any reason, there is no contract that can bind the railroad company, is there any contract that can bind the county? A contract to be binding on either party must be binding on both.

In the case of the *Toledo Bank v. Bond*, 1 Ohio Stat., 657, the court says that the essential elements of a contract are the following, to-wit: 1st, the assent or agreement of two competent parties. 2nd, a legal and competent object or subject matter. 3d, a mutual legal consideration. 4th, a mutuality of obligation. In the absence of either one of these essential requisites there is no contract. The resolution entered of record, even if we give full effect to it, is but a simple proposition, which, according to the finding of the court, was not accepted, if accepted at all, (which we deny) until July, 1871, and until after the new constitution took effect.

The fact that the railroad company afterwards constructed their road between the city of Decatur and the

town of Sullivan, agreeably to the terms of the charter, is, of itself, nothing. It should have appeared that they agreed with the defendant thus to construct it, as a consideration for the promise. The promise of each must be concurrent and obligatory, at the same time, to render either binding.

U. S. R. R. Co., v. Brinckerhoff, 21 Wend., 140.
Burnet v. Briscow, 4 Johnson, 235, 236.
The State v. Barker, 4 Kan., 379.
Macedon and Bristol Plank Road Co. v. Suediker, 18 Barber, 318, 319.
Cook v. Oxley, 3 Term R., 653.

The order extended upon the records of the board of supervisors of the county could certainly have no more binding efficacy than where a vote had been taken, resulting in favor of subscription. There is not in this order, as it appears upon the records of the county, an element of mutuality. Nothing is recited in the order showing that the railroad company had ever assented to the proposition contained in the order, or that the railroad company had ever agreed or would agree to issue the stock in payment of the bonds. It is, however, contended that the contract made between the railroad company and Brink & Conant is evidence of the fact that the railroad company would accept the proposition of subscription contained in the resolution. The question is not, would the railroad company accept the proposition, but whether they did accept, so as to bind the county before the adoption and taking effect of the present constitution. The contract with Brink & Conant was not admissible in evidence. It is not a contract to which the county was a party, and surely a representation made by the railroad company to a third party, that they intended

to accept the subscription, did not bind the county. The defendant objected to this contract being received in evidence, and his objection should have been sustained.

By the finding of the court the railroad company did not assent to the subscription, and none, in fact, was attempted to be made until the month of July, 1871. If the subscription had been previously made, why require this formality before permitting the county of Moultrie to have a voice as a stockholder in the election, or in the affairs of the railroad company?

We have before referred to the section of the constitution under which we claim that the act of making the subscription and afterwards issuing the bonds of the county, were *ultra vires*, and therefore void. It is not claimed in this case that the subscription was made, and the bonds of the county issued, in pursuance of a vote of the people. The bonds themselves recite no vote, neither does the pretended order under which they were issued. The proviso in the constitution only extends to and authorizes the issuing of municipal bonds when they have been previously authorized under existing laws, by a vote of the people of such municipality.

In the case of *Schall et al. v. Bowman et al., ubi supra*, 62 Ill., 325, the question of the operation of the new constitution upon existing charters is not directly considered, yet it is evident, from the scope of the decision, that the paramount authority of the constitution was fully recognized. In that case the question was asked by counsel for the appellee, "Was there any pressing necessity that this section should go into effect thirty-six days before the constitution itself?" "We answer," the court says, "the con-

dition of these municipalities to which we have adverted, and the increasing demand for railroads, many of those enterprises thrust upon the attention of the people so clamorously, admonished the convention that they could not be too prompt in arresting the tide. A delay of a single week might have produced insolvency of these municipalities, greatly swelling the already enormous aggregate. Many of those who vote these subscriptions, it was well known to the convention, and to everybody else, did not posses a dollar of their own, or any property to be taxed. But a much more deplorable condition existed where the power was conferred upon municipal officers by railroad charters, prepared in the interest of the railroad company, without submitting the same to a previous vote of the people. If constitutional prohibition was requisite in the former case, it was much more so in the latter, when, often, the municipal officials were made the railroad directors, officers and agents. In this case, the chairman of the board of supervisors was one of the directors, and the county clerk, who issued the bonds, was the president of the railroad company."

The order or resolution shows that seventy-five thousand dollars was donated, having been previously authorized by a vote of the people. Why not have submitted under the 9th section of the charter, as the board had authority to do, the proposition for a subscription of eighty thousand dollars, in addition to the seventy-five thousand dollars donated, if no fraud or imposition had been intended. They knew well that such a proposition would not have received the sanction of the legal voters of the county. They never would have voted a hundred and fifty-five thousand dollars to a railroad starting at one village and ending at another. It was these abuses that the constitution was intended to

remedy; but what remedy would the constitution afford if municipal officers could go on making subscriptions and granting municipal aid under existing charters, having nothing to do in order to avoid the restrictive and prohibitory clause contained in the constitution, but falsely to recite a state of facts that showed *prima facie* authority for issuing the bonds. We shall have occasion hereafter to refer to the effect of recitals, but our object at present is simply to call in question the existence of the power to issue municipal bonds that have not been previously authorized under existing laws by a vote of the people of such municipality, prior to such adoption of the constitution; for it will not be controverted that, independent of special power conferred by the legislature on county authorities to make such subscription, they have no authority, and their acts are *ultra vires* and therefore utterly void.

Marshall County v. Cook, 38 Ill., 44.

The question as to the effect of the present constitution, when it went into operation, upon existing legislation, where there is a repugnancy between the constitution and the law, is ably considered by Justice Thornton, in the case of *O'Connor v. Leddy*, 64 Ill., 300; and it was there held that the constitution abrogated all existing laws that were contrary to its provisions, and that a constitutional provision designed to remove an existing mischief, should never be construed as dependent for its efficacy in operation upon legislative will.

The People *ex rel.* v. Rumsey, 64 Ill., 44.
Hill v. The City of Chicago, 60 Ill., 86.
The People *ex rel.* v. Lippincott, 65 Ill., 548.
Marshall *et al.* v. Stilliman *et al.*, 61 Ill., 221.

There is a direct conflict between the resolution as it appears of record authorizing the issuing of these bonds and the 10th section of the charter before referred to. The one authorizes (that is, the resolution as recorded by the county clerk, though not as passed by the board of supervisors, or even as drafted by Eden,) the issue of the bonds of the county by the chairman, whenever the railroad company should have completed and equipped their said line of railway through the county of Moultrie. The charter provides that "the bonds shall not be issued until said railroad shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid." There is no pretense that this order purporting to be made by the board of supervisors pursued the authority conferred on the board by section 10 of the charter, even if that section had not been abrogated by the new constitution. The proviso in section 10 of the charter is an express limitation upon the power of a board of supervisors. Whilst it may be true that by the provisions of this section of the charter the board of supervisors are constituted the tribunal who are to judge of when the road is opened for traffic between the city of Decatur and the town of Sullivan, yet they have no more power to dispense with any single requirement contained in the charter essential to the exercise of the power itself, than a private individual would have. Was it competent for the board to say that they would dispense with the completion of the road from Decatur to Sullivan, and substitute instead of the city of Decatur the completion of the road to the Moultrie county line?

In order to bind the county, the board of supervisors must have authority conferred on them by law to act, and

they must, at least in their action, profess to pursue the power thus conferred on them. The general principle of law is well known and definitely settled that the agents, officers, or even city councils of a municipal corporation, cannot bind the corporation when they transcend their lawful and legitimate power. The officers of the corporation, including the legislative and governing body, are merely the public agents of the corporation; their duties and their powers are prescribed by statute. In a word, such corporations are the creatures of statute; they have no inherent or common law powers; the statute is to them their organic act.

Hooper v. Emery, 14 Maine, 375.
Dillon on M. C., 2d. Ed., p 104, n.

Every one, therefore, may know, and is bound to know, the nature of his duties and the extent of his powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule. But the corporation is bound only when its agents keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of *ultra vires;* that is, set up as a defense its own want of power under its charter, or constituent statute, to enter into a given contract, or to do a given act, in violation or excess of its corporate power or authority.

Clark v. The City of Des Moines, 4 Am. Law Reg., (new series) 149.
Marshall County v. Cook, 38 Ill., 44.
Marsh v. Fulton County, 10 Wallace, 676.
Bissel et al. v. The City of Kankakee, 64 Ill., 251.
Harding v. The I. & St. L. R. R. Co., 65 Ill., 91-2.
Dartmouth College v. Hercules et al., 57 Ill., 449.

If we are correct in the views we entertain with reference to the invalidity of the resolution as it appears of record to have been made by the supervisors at the Decemben special term, 1869, then a subscription made in pursuance and by the authority of that resolution is void.

It is, however, contended that these defects are aided by reference to the recitals in the bonds, and that the county is precluded by way of estoppel from asserting the truth, the bonds having been negotiated and passed into the hands of *bona fide* holders. The bonds in question on their face purport to be issued by virtue of the subscription which is claimed to have been made at the December special term, 1869. At that time, as we have before seen, no order had been made by the board of supervisors for the issuing of these bonds. That part of the pretended order directing the chairman of the board to issue and deliver to the railroad company the bonds of the county, is, by the special findings of the court, found to have been entered by the clerk without any authority from the board of supervisors. Certainly, such an unauthorized entry could not in any manner bind the county.

The clerk's powers are defined by statute. Section 10 Article 14, (title, Township Organization) 1 Gross' Statute, 757, provides: "The clerk of the county court shall be clerk of the board of supervisors, whose general duties shall be: 1st, to record in a book to be provided for that purpose, all the proceedings of the board. 2d, to make regular entries of all the resolutions or decisions on all questions concerning the raising or payments of money, or for the regulating of affairs under their control. 3d, to record the vote

of any of the supervisors on any question submitted to the board, if required by any member of the board. 4th, to file and preserve all accounts acted upon by the board."

By virtue of the provisions of this section of the statute, which embraces his entire duties, so far as the board of supervisors are concerned, it will be seen that his office is a mere ministerial one and that his duties as clerk of the board are carefully defined to be the entering or recording of the actions and resolutions of the board, and that when he entered the order or resolution in question, he was guilty of making up a false record; and that neither the county, the board of supervisors, or the tax-payers can be concluded by such an unauthorized act.

Without this unauthorized entry by the clerk, the chairman of the board of supervisors would have had no authority or apparent authority to execute these bonds. No authority is conferred on him by the act of incorporation of the railroad company, and none exists by virtue of the township organization laws. Section 4 of the Act of 1861, Title, Township Organization, Gross' Statute, 757, provides, that "the board of supervisors at their first meeting in every year shall organize by choosing one of their members as chairman, who shall preside at all meetings of the board during the year. In case of his absence at any meeting the members present shall choose one of their number as temporary chairman." In all other respects the duty of the chairman is the same as the duty of any other supervisor. In the case of *Clark v. The Board of Supervisors of Hancock County*, 27 Ill., 309, it is said that the law has failed to prescribe the mode of executing these bonds, or to designate

any person who shall sign them; and in the absence of such a requirement, they, we think, had the unquestionable right by order of the board, duly passed, to authorize any person they might choose, to sign the instruments, in order to man ifest their intention of completing the act. This was not properly an exercise of power, but simply a mode of manifesting the fact that the power had been exercised by the board.

Marsh v. Fulton county, 10 Wallace, 681.

But it is contended that even if they failed in obtaining authority from the board of supervisors under the order or resolution of December, 1869, still authority is given by the resolution of the board entered at the December term, 1872. This resolution, if it means anything, simply means that the chairman shall appoint a committee to examine the records and report to the board of supervisors the result of their investigation, and that upon the further action of the board of supervisors, on the coming in of the report of the committee, the chairman and county clerk should issue bonds, &c. To give to the resolution any other construction, would be to delegate to the committee the power of deciding questions which the statute has conferred upon the entire board, and which, as we have already seen, they had no power to do. The exercise of the power was confided to them alone, and they only could exercise it legally.

Clark v. the Board of Supervisors, *supra*.

The committee, even by the terms of the resolution, were not authorized to decide what roads were, and what roads were not, entitled to donations. They could only report; and upon the report being made, the board of supervisors

were alone empowered to act. They were required to report to the board, and not to the chairman of the board. But even then the committee were not, by the terms of the resolution, authorized to report on subscriptions, but only upon such railroads as were legally entitled to donations, and only where the bonds had been previously voted.

The bonds do not profess on their face to have been issued by virtue of this, or any other resolution offered or passed by the board of supervisors. They are made to recite no order, neither do they profess to have been issued by virtue of an order made by the board of supervisors. (See *Treadwell v. Commissioners*, 11 Ohio St., 192, 193.)

This brings us to the consideration of the question how far the county is estopped from setting up these facts, by the negotiable form of the bonds. Negotiability will not validate obligations which are not binding because of a want of power to issue them. *Gould v. Sterling*, 23 N. Y., 434. 1*st American Law Register* (new series) 290, and the note of Prof. Dwight thereto, in which he says that "the representation by an agent can never establish the fact of agency. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principle is concerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term "negotiability" pre-supposes the existence of an instrument made by a person having capacity or power to contract in that particular manner."

Hull et al. v. Marshall County, 12 Iowa, 142.

There is no express authority to the board of supervi-

sors except what is contained in the 10th Section of the charter, which is declared to be a public act; and the existence of such power, or the want of it, becomes constructive notice to every person dealing in the bonds; and every purchaser of these bonds is charged with notice of the want of power on the part of the county agents to issue them.

This question is very ably considered in the case of

Rochester v. Alford Bank, 13 Wis., 488, and also
Angel and Ames on Cor., 248, 7th Ed.
Peterson v. The Mayor, &c., 17 N. Y., 449.
The Proprietors of Canal Bridge v. Gordon,
1 Pick., 304.
Regents v. Williams, 9 Gill. and Johnson, 365.
Ruby v. Abyssinian Soc., 15 Maine, 306.
Burdick v. Champl. Glass Co., 11 Vt.
Clark v. The City of Janesville, 10 Wis., 136.

In the case of the *United States v. The Bank of Metropolis*, 15 Peters, 377, it is said: "When the United States *by its authorized officer* becomes a party to negotiable paper, they have all the rights and incur all the responsibilities of individuals who are parties to such instruments, and all the party taking such paper have to look to, was the genuineness of the acceptance and the *authority of the officer* to give it."

In the case of *Floyd's acceptance*, 7 Wallace, 676, it is said by the court—"An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him, and this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a

limited authority to draw or accept under given circumstances defined in the instrument which confers the power, but in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must at his peril see that the paper on which he relies comes within the power under which the agent acts; and this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued.

These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market, purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government. In the case of *Marsh v. Fulton County*, 10 Wallace, 683, the court says: "This is not a case, in speaking of the Fulton county bonds, *where the party executing the instrument possessed a general capacity to contract*, and where the instrument might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed; where the instrument might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issuing of the bonds. The authority to contract must exist before any protection, as an innocent purchaser, can be claimed by the

holder. This is the law, even as respects commercial paper, alleged to have been issued under a delegated authority, as is stated in the case of *Floyd's Acceptance.*"

See, also, Pierce v. The Madison and Indianapolis Railroad Company, 21 How., 442.

In the case of *The Mayor, &c., v. Ray*, 19 Wallace, 476, the court was equally divided in opinion, but the opinion of Messrs. Bradley, Miller, Davis and Field restricts the rule still more than the preceding cases, when applied to the acts of officers of municipal corporations. They say, "our system of local and municipal government is copied in its general features from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an act of parliament authorizing it. We believe no such practice has ever obtained.

Much less can any precedent be found, except of modern date, and in this country, for the issue, by local civil authorities of promissory notes, bills of exchange and other commercial paper. At a period within the memory of man the proposal of such a thing would have met with astonishment. The making of such paper was originally confined to merchants, but its great convenience was the means of extending its use, first, to all individuals, and afterwads to private corporations having occasion to make promises to pay money. They know its immunity in the hands of a *bona fide* holder from all defenses and equities. Knowing this, if they choose to issue it, no one is injured but themselves. But, if city and town officials should have power thus to bind their constituencies, it is easy to see what

abuses might and probably would ensue. We know, from experience, what abuses have been practiced where the power has been conferred. Fraudulent issues, peculations and embezzlements, and the accumulation of vast amounts of indebtedness, without any corresponding public benefit, have been rendered easy and secure from merited punishment. The purpose and object of a municipal corporation do not ordinarily require the exercise of any such power. They are not trading corporations, and ought not to become such. They are invested with public trusts of a governmental and administrative character. They are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order and general well-being of the community as a political society and district, invested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations of such character, as to be irretrievably binding on the people, without a shadow of consideration in return, is the growth of a modern misconception of their true object and character."

The board of supervisors of a county is a *quasi* corporation—a local organization—which, for the purposes of civil administration, is invested with a few of the functions characteristic of a corporate existence.

Commissioners of Hamilton Co., v. Mighels, 7 Ohio Statute, 109-115.

A grant of power to such a corporation must be strictly construed. When acting under a special power, it must act strictly on the conditions under which it is given.

The Queen v. Ellis, 6 Q. B., 501, 516.
Stryker v. Kelly, 7 Hill, 9-25.

Again, the law of the *lex loci contractus* under which the bonds in this case were issued, was well settled by a series of adjudications long before the bonds in question were issued, that all persons dealing in securities issued by municipal corporations, are chargeable with notice of a want of authority upon the part of such corporation to issue them.

Now, will the negotiable character of such securities protect a purchaser before maturity against the consequences of a want of such authority? Bonds issued under such circumstances are absolutely void; and being absolutely void, cannot be made valid by false recitals.

Marshall County v. Cook, 38 Ill., 44.
Schuyler County v. The People, 25 Ill., 181.
Supervisors v. Clark, 27 Ill., 385.

The bonds being void for the reason that they were issued without authority of law, the next question is: Is the county concluded by the recital in the bonds, or may not the county, notwithstanding the recital, show their invalidity? The doctrine of estoppel never applies where the instrument or record creating the estoppel is void.

Rochester v. Alfred Bank, 13 Wis., 489.
Treadwell v. Com'rs, &c., 11 Ohio Stat., 191.
Marsh v. Fulton county, 10 Wallace, 681.

The authorities, if they are reconcilable at all on this question, can only be reconciled by drawing a distinction between the want of power and authority and mere *irregularities* in the execution of the power, where the authority itself is shown to exist.

5 Ell. & Black, 248.
Maclae v. Southerland, 28 E. L. & E., 114.
Pierce v. Madison & Ind. R. R. Co., 21 How., 442.

Even in an action on a judgment rendered, it has been held that the recitals in the record that the defendant was personally served with process, is not conclusive; but the defendant may show that he was not served, and that the court never acquired jurisdiction of his person, and surely it will not be contended that the recitals in a municipal bond made by a mere ministerial officer whose duty it is not to execute such bond, are more conclusive in their character than the finding and judgment of a court.

Knowles v. Gaslight & Coke Co., 19 Wallace, 58.
Thompson v. Whitman, 18 Wallace, 457.
Galpin v. Page, 18 Wallace, 351.

Dillon, in his work on municipal corporations, in commenting on the case of *Knox County v. Aspinwall*, 21 How., 539, says: "The author ventures to remark that he believes the decision to be right, and for the reasons thus clearly stated by the able and experienced judge; but as sustaining the decision, a further position, by way of argument is taken, which, with great deference, he considers to be untenable, of a most dangerous nature and tendency, and plainly subversive of an important principle in the law of agency, applicable both to private and public agents. That position is this, that a purchaser of the bonds had a right to assume, from the mere fact that they were issued, that the conditions on which the county was authorized to issue them had been complied with, and that a recital in the bonds that the requirements of the law had been met,

amounts to an estoppel *in pais* upon the corporation, of which the officers issuing the bonds are the public agents.

In general, where one acting under a letter of attorney transgresses the limits of his authority, the principal will not be bound even as between himself and the party with whom the attorney deals; as between one dealing with an agent or attorney as such and the principal, the former is chargeable with a knowledge of the legal effect of the authority.

North River Bank v. Aymar, 3 Hill, 262.

All the authorities are uniform in holding that in order to bind the principal, the authority of the agent must exist at the time that the act is performed, and whatever false recitals may be made by an unauthorized agent, such recitals will not bind the principal; for where there is no agent there can be no binding act of agency. But where there is an agent, slight and immaterial deviations from the mode prescribed in the execution of such agency, will not invalidate negotiable securities; but if the body assuming to act had no legal authority, or omitted some essential prerequisites in the execution of such securities, then they are a nullity.

Schuyler County v. The People, 25 Ill., 181.

The Supervisors of Hancock County v. Clark, 27 Ill., 305.

It is upon the principle that there is a wide difference between an act performed without authority or in violation of law and an act defectively performed under authority. In the former case the act is absolutey void, while in the latter it may become binding by ratification or by mere acquiescence.

Marshall County v. Cook, 38 Ill., 50, 51.

Public officers, from the highest to the lowest, must act within the scope of their authority, or their acts will be void; but having the power, an injudicious, or even an erroneous exercise of the authority, does not render the act void, but voidable.

In illustration of our position, suppose a person purchases property at a sheriff's or master's sale: in order to render his purchase availing, he must show that there was a valid and binding judgment or decree, and an execution in the one case and an order of sale in the other. It is not sufficient to show an execution without a judgment, even though such execution recited the judgment. If the judgment is for any cause void, the execution and sale, although the sale may have been made to a *bona fide* purchaser without notice of the defect, is void also; and the fact that the execution properly recited a legal and valid judgment, will not aid. It is not sufficient that it appears that the officer had power, under any circumstances, to perform the act, nor can the question of the *bona fides* of the transaction be considered in such cases. The bidder purchases at his peril, and his assignee is in no better condition. It is a question simply of power, and not of good faith. It would therefore appear that the county agents, upon analagous principles, only acquire power to act in the mode prescribed by the law. In the absence of a want of power to issue the bonds, they are void in whosever hands they may be found. It is a familiar rule, that a note given, or a contract executed for an immoral or illegal consideration, is held to be void in any person's hands. A forged note, or a note executed by a person assuming, without authority, to act as the agent of another, and a note altered in a material part, although such

note may be assigned or negotiated, are not by that means rendered binding. But the same defense may be made in the hands of the assignee, as in the hands of the original holder.

In the cases of *Rogers v. Buckingham*, 3 Wall., 654; *Cincinnati v. Morgan, ib.*, 275; *Mercer County v. Hacket*, 1 Wall., 83; *Mayor v. Muscatine, ib.*, 385-393; *Bissel v. Jeffersonville*, 24 How., 287; *Gelpcke v. Dubuque*, 1 Wall., 175, 203, where the question of recitals was held to operate as an estoppel *in pais* upon municipalities, were cases in which the court found that such municipalities had authority to issue the bonds, and the defects complained of were held to be mere irregularities.

To give to those cases any other scope would be to render them irreconcilable with the doctrine announced by this court in the case of the *Floyd Acceptances* and *Marsh v. Fulton County*, 10 Wallace, 681, *ubi supra*.

It is true, that the language used in some of the cases would seem to indicate a broader scope, when taken without reference to the facts upon which they were decided. If those decisions are taken in connection with the facts upon which they were founded, they will be found to be correct, but as abstract legal propositions, they are in direct conflict with the uniform current of authority founded on the relation of principal and agent. Is it true, as a legal proposition, that when a corporation has the power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached in the hands of such holder than any other commercial paper?

It is true, as was well decided in the case of Floyd's Acceptances, that if the officer issuing them had authority of law so to do, then they are placed on a footing with any other commercial paper; but the question of the authority of the agent to bind his principal in the execution of commercial paper is always an open question, and one that is liable to be inquired into between the holder and the principal. The language of the court should not be construed as bearing the interpretation that because the instrument is in form negotiable, therefore, the holder, although *bona fide*, is protected, for no rule is better recognized in the commercial world, than that the forgery of the drawer's or indorser's name does not protect the holder, however innocent he may be. Nor do we understand that a note declared by statute to be void in the hands of an innocent holder, becomes valid. Otherwise the statute, declaring it void, would be wholly inoperative.

The holder of an instrument whose execution is prohibited by the statute or is void for want of power in the party who executes it, although ante-dated so as to appear to have been legally issued, before the statute declaring it void took effect, and although negotiated before its maturity, is not protected.

Bailey v. Taylor, 5 Mass., 285.

This principle was recognized as the law of the state of Illinois long before the issuing of the bonds in question. The fact that such an instrument was made to bear a false date is held to give it no additional validity. And such an instrument could not be enforced in the hands of an innocent holder.

The very fact that these bonds were offered to be negotiated, and bore date subsequent to the taking effect of our present constitution, was, of itself, enough to put the party upon inquiry and taint the transaction with the original *mala fides*. In the case last cited, the court says that it is not altogether certain that the receivers of such instruments are entirely free from blame, although not privy to the making or ante-dating of them. The laws of the government, the court says, are presumed to be known to all the citizens, and if the notes were in fact made or issued after they were declared void by statute and after a penalty was attached to them, to authorize the holder to maintain a suit and recover judgment on notes of this description, so situated when the legislature has declared them void, would be effectually to annul an act of wisdom and policy of which the legislature alone had the right to judge.

If the board of supervisors could, by false recitals, bind the county in 1872, they can continue, notwithstanding the express prohibition in the constitution, to bind their respective counties, wherever a charter can be found conferring the authority upon the county board thus to act; and all the mischief designed to be prohibited will be let loose upon the counties, and, practically, the prohibition contained in the constitution will be completely nullified. This is not the construction placed upon the constitution by the supreme court of Illinois. The court will not allow the constitution and acts of the legislature to be avoided in that way.

Marshall County v. Cook, 38 Ill., 57.

If the *lex loci contractus* governs and the court recogni-

zes the binding authority of the state courts, then it is conclusive of this question.

Dart. v. Hercules et al., 57 Ill., 449.
Bissel et al. v. the City of Kankakee, 64 Ill., 251.

These decisions were made before the bonds in question were issued, and are conclusive of this case, provided that they are followed by the Federal Courts.

And this brings us to the consideration of the question —how far the federal courts sitting in a state, will feel themselves bound to follow the decisions of the highest tribunal of the state; and we may venture the assertion that the case is one of an exceptionable character, in which the federal court will feel itself justified in departing from the uniform decisions of the state court.

King et al. v. Wilson, 1 Dill. C. C. R., 557.
Green v. Neal, 2 Peters, 291.
Leffingwell v. Warren, 2 Black., 299.

We come now to the consideration of the only remaining question; and that is as to whether the plaintiff is entitled to be regarded as a *bona fide* purchaser. It is hardly necessary to cite any additional authorities to prove that every person dealing with municipal securities, is bound to take notice at his peril of the law under which such securities are issued. They are also bound to take notice of the records of the board of supervisors.

Marshall County v. Cook, 38 Ill., 50.
Marsh v. Fulton County, 10 Wallace, 683.

Taking notice of the records in this case, the purchaser of these bonds could not fail to see that they were issued

and may be set aside as a nullity and called in question in the course of any collateral controversy.

The only remaining question upon this point: is the meeting of the board of supervisors presumptive evidence that the notice required by the statute has been complied with? The weight of authority is that such notice is jurisdictional; that it cannot be proved by parol, and that it is not satisfied by the meeting of all the members of the board.

Sherwin v. Bugbee, 17 Vt., 337.
Hunt v. School District, 14 Vt., 300.
Rideout v. School District, 1 Allen, 232.

The meeting without the notice would not be legal even though all the supervisors were present. It was, however, held otherwise, where all the board was present in the case of *Rex v. Theodorick*, 8 East. 543; but it was admitted in that case that where the acts are to be done by a select number, notice must be given of the time of meeting, and that it is to do some corporate act, though what corporate act, need not be specified, and in such case the act of a majority would bind the whole body; or if all were present by accident their act would be good; but the act of a majority present by accident would not be binding.

King v. The Mayor, &c., of Shrewsbury, (Rep. temp. Hardw. 151.)

It is evident, however, that the statute required more than the presence of the board, for in addition to notifying the supervisors by transmitting a written notice to each of them, the clerk is required to publish in some newspaper published in the county, a notice of such meeting. But the

without authority of law, and in violation of the express provision contained in the charter. For the order of December, 1869, directs the chairman of the board to issue and deliver to the railroad company the bonds when the railroad company shall have equipped their line of railroad through the county of Moultrie, as we have before shown. But even this order, fraudulently spread upon the records of the county, without the knowledge or consent of the board of supervisors, is not sufficient authority to authorize the issuing of these bonds. The bonds could not be legally issued until the board of supervisors had determined that the conditions upon which the bonds were to issue had been complied with, neither could that matter be referred to or determined by a select committee.

Looking to the records of the county, as the purchaser is legally bound to look, there is no authority for issuing these bonds. Finally, both the resolutions of 1869 and December, 1872, as they appear of record, are absolutely void upon their face. They are both special meetings and there is nothing in the record to show that these special meetings of the board were called and notified as required by the second section of the laws of 1861, titled Township Organization, 1 Gross' Statute, 756. That the record should show a compliance with the requirements of this section of the statute, is settled by the authorities collected in 1 *Smith's Leading Cases*, 991. The rule is stated thus: "The jurisdiction of limited and inferior tribunals cannot be presumed and must be shown affirmatively to confer validity on their acts. Hence, when the facts necessary to give such a tribunal jurisdiction do not appear on the face of the proceedings, and are not proved *aliunde* the whole will be void,

resolution of the special meeting of the board December, 1872, shows that Hetherington and Kinney, two of the members of the board, were absent.

That these bonds, as shown by the special findings of the court, were fraudulentlyly issued, and without authority of law, by the chairman of the board of supervisors and the county clerk, one a director and the other president of the railroad company, we insist does not admit of a doubt; and that for the reasons we have stated, the county ought not to be compelled to pay them, but that the plaintiff ought to be left to its remedy against the railroad company.

HENRY & PENWELL, AND JOHN R. EDEN,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

THE COUNTY OF MOULTRIE.

vs.

THE ROCKINGHAM TEN CENTS SAVINGS BANK.

Error to the Circuit Court of the United States for the Southern District of Illinois.

This was a suit in assumpsit instituted by defendant in error in the Circuit Court for the Southern District of Illinois, declaring specially upon certain interest coupons, attached to bonds issued by the County of Moultrie, which, as the record shows "plaintiff had bought before maturity, for value, and without notice of any defence." Transcript p. 18.

The question to be considered, is whether the judgment of the circuit court in favor of the plaintiff is authorized in view of the special findings set out in the transcript.

Our first inquiry is, was the Board of Supervisors of Moultrie county authorized by legislative act to subscribe the bonds and coupons in question.

The bonds on their face recite, "that they belong to a "series of eighty, of the denomination of One Thousand Dol- "lars each, issued by the county of Moultrie, in pursuance of

"the subscription of the sum of eighty thousand dollars to "the capital stock of the Decatur, Sullivan & Mattoon Rail- "road Company by the board of supervisors of said county of "Moultrie in December, A. D. 1869, in conformity to the "provisions of an act of the General Assembly of the State "of Illinois approved March 26th, 1869."

The act of assembly cited upon the face of the bonds is contained in the private laws of Illinois of 1869. 3d Vol. p. 1.

Sec. 12 provides that it shall be deemed a public law. Sec. 9 provides that incorporated towns, cities, counties, and towns organized under the township organization law, along or near the route of said road, may in their corporate capacities subscribe to the stock of said company, or make donations thereto to aid in building said road. The section further provides how application shall be made to clerk for calling an election and what the petition shall state, the amount, and rate of interest of the bonds, whether to be donated or subscribed, and then provides for giving notice of an election, holding the election, counting returns &c, and finally provides "that in *all cases* of the issue of bonds under this act, *the same* "*shall be countersigned by the clerk of the incorporated* Town, City, "*County* or Township"

Sec. 10 is as follows: "The board of supervisors of "Moultrie County are hereby authorized to subscribe to the "capital stock of said company to an amount not exceeding "Eighty Thousand Dollars, and to issue the bonds of the "county therefor, bearing interest at a rate not exceeding ten "per cent per annum, said bonds to be issued in such denom- "inations and to mature at such time as said board of super- "visors may determine; provided, that the same shall not be "issued until the said road shall be opened for traffic between "the city of Decatur and the town of Sullivan, aforesaid."

It is seen that by the foregoing 10th section of the charter, full authority from the Legislature of Illinois is conferred upon the Board of Supervisors to subscribe an amount not exceeding eighty thousand dollars, to aid in the building of this road, and to issue bonds therefor. There can be no question under the decisions of the courts, but that the Legislature may authorize a county or town to subscribe by its Board of Supervisors or officers, instead of by a vote of the people. Town of Keithburg vs. Frick, 24 Ills., p. 405.

We have conceded to us, then, in the outset of this case, three prominent facts, viz:

1. That plaintiff is the bona fide holder of these coupons, bought by him for value before due, and without notice of any defence. 2. That the bonds contain the recitals above set forth; and 3rd, The act of the legislature containing the authority as shown by sections 9 and 10.

The first assignment of error raises a constitutional question, by alleging, that the Circuit Court erred in deciding for appellee after finding specially that no subscription had been made by the county until after the new Constitution of Illinois went into force with its prohibitory clause against municipal subscriptions to railroads.

In the first place, the special finding by the court is not in the language used in the assignment of error. The finding will be found on page 12 of Transcript, and it will be seen that the court only finds "that no subscription "was in fact made by the Board of Supervisors aforesaid, *upon* "*the books* of said Railroad Company, until the month of July, "1871, when the same was made by Joseph Titus, Chairman "of said Board of Supervisors, *without any express* authority "from said board, *for the purpose of enabling said Titus* to vote "at an election then being held by said company."

This is equivalent to finding that the entry of this subscription was never authorized at all by *the board* to be made on

the Railroad books; and that Titus, for some purpose of his own, or others interested, and without leave or license of the county, did this unauthorized act.

We are certain counsel greatly misconceive the force of this special finding—for it would hardly do for the Circuit Court to find that *no subscription* was made by the county until after the Constitution went into force forbidding such subscriptions, and then render judgment for plaintiff, upon bonds issued in pursuance of such constitutionally forbidden subscriptions! This would be placing the Circuit Court in a more ridiculous light than opposite counsel themselves could intend. This is one of the special findings made to accommodate appellant's counsel, and in their own selection of language, as they conceived force in the point, which perhaps, the Circuit Court laid no stress upon.

In this case, the charter gave the Board of Supervisors power to subscribe. It did not specify in what form or manner they should subscribe. The usual mode then, is by order or resolution, *saying they subscribed*. 1. *Dil.* § 374. Such an order, or resolution, passed by the board, would be amply sufficient *without any* actual subscription on the Railroad books at all; and there being an order or resolution of the Board of Supervisors in this case, as we shall hereafter see, *saying they subscribed*, certainly was in the opinion of the Circuit Court the substantial point, and the special finding for appellant's accommodation referred to on page 12, of the Transcript, and upon which appellant's counsel bases his first complaint of error, the Circuit Court must have considered unimportant in view of the facts in this case.

This court, in deciding the case of Nugent vs. Supervisors of Putnam County, October term, 1873, cited as authority, and quoted from a case in 11 Ky., B. Monroe, p. 143, Clark County, vs. The Paris Kentucky River and Winchester Turnpike Co., "where it was ruled, that an order of

"the County Court, by which it was said, that it subscribed "for a specified number of shares of road stock, *was binding*, "*the court* having *authority to make a subscription.*"

The clause of the Illinois Constitution of 1870, upon which appellant relies as prohibiting this subscription, contains the proviso "That the adoption of this article shall not "be construed as affecting the right of any such municipality "to make such subscriptions where the same have been author- "ized, under existing laws, by a vote of the people of such "municipalities prior to such adoption."

This clause, we submit, would have no bearing upon a subscription *already made* by an order of a Board of Supervisors, the board having by law, authority to subscribe by order or resolution without a previous vote of the people.

We claim, that in this case, a subscription had been made before the new Constitution of Illinois went into effect. It is true the bonds and coupons in question did not issue *until after*, and for obvious reasons apparent from the charter and the special findings. The proviso to section 10 of the charter forbid *bonds to be issued* UNTIL the road should be open for traffic between Decatur and Sullivan. And we plainly see from the report of the County Committee, and notices served on the County officers by the General Superintendent of the Railroad Company (found on pp. 13 to 16 of the Transcript) that, although the subscription of this eighty-thousand dollars may have been made long before, yet the County and Railroad officials were awaiting ~~this~~ a compliance with this proviso, before the bonds were called for on the one hand, and issued on the other.

Appellant wishes to fix the consummation or completion of this subscription at the time when Titus entered this subscription upon the railroad books, because this would bring the case within the decision of this court in the Aspinwall case in 22 Howard.

the Railroad books; and that Titus, for some purpose of his own, or others interested, and without leave or license of the county, did this unauthorized act.

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Appellant wishes to fix the consummation or completion of this subscription at the time when Titus entered this subscription upon the railroad books, because this would bring the case within the decision of this court in the Aspinwall case in 22 Howard.

This act of Titus, as we have shown, by calling attention to the language and character of the special finding, was not the act of the board, or even within its knowledge at the time, so far as the record shows. It cannot then be fairly chargeable to the county as one of the steps taken by the Board of Supervisors to subscribe, and should therefor have no bearing on the case.

The County, however, did acts, through its Board of Supervisors, the force and bearing of which upon this case we will now proceed to consider. These acts, too, appear upon the records of the board in the order of time, and place thereon, in which they purport to have taken place.

On pp. 10, 11 and 12 of the T. of R. appears a certified copy from the records of the Board of Supervisors of orders of said board donating $75,000 and subscribing $80,000 to the capital stock of the D. S. & M. R. R. Co. It all appears on the records of the board as one connected, simultaneous, order or resolution, donating $75,000 which had been previously voted upon by the people under section 9, of the charter, and subscribing $80,000 under and by virtue of Sec. 10 of the charter.

Appellant's second assignment of error is upon the ground that the court found that the Board of Supervisors had passed only an *informal* resolution of subscription and referred the same to John R. Eden, an attorney, to put in form, and that the informal resolutions never were recorded, nor authorized to be recorded. In other words, they would allege, that the Board of Supervisors having the lawful power to subscribe by order or resolution, cannot do so by passing an order anywise informal or untechnical; or, at all events, without placing *it* in its untechnical form upon its records.

Now, we presume, that, like a will, or contract, there need be no particular phraseology, or form, to make such a resolution or order, effective. Just *what* form the original

order or resolution was which passed the board, we cannot say. On page 10 of the Record, the court finds that on the 16th of December, 1869, the Board of Supervisors of Moultrie County *passed* some kind of informal resolutions *to the effect* that the County of Moultrie would donate to the D. S. & M. R. R. Co. $75,000 that had been previously authorized by a vote of the legal voters of said county, and that they would subscribe $80,000, *in addition*, to the capital stock of the D. S. & M. R. R. Co., and that said resolutions be referred to John R. Eden, an attorney, *to put in form before* the same should be recorded on the records of said Board of Supervisors.

On page 12, of the Transcript, the court finds that Eden did prepare said resolutions from minutes furnished him by the Chairman of the Board of Supervisors.

We presume that any representative or legislative body may refer its informal orders or resolutions to its clerk, or attorney. or other competent agent, to put the same into proper phraseology or form before recording; and in such case its passage; its reference for the purpose named; and its recording after being put in form, would be all one act, one exercise of lawful authority, in legal contemplation. Eden, so far as the transcript shows, knew nothing of the matter except from minutes furnished him by the board, and it does not appear he misused the confidence or trust reposed in him by the board in any way, so that what he did was an act of the board itself, through its own chosen and authorized agent, and tested by all the rules of agency, why should the county not be bound by the *form* given its resolutions by its own agent?

But the error complains that the *informal* resolutions were not recorded, nor authorized to be.

This we submit would be the sole business of the board, whether it will keep decent formal records of its proceedings, or the reverse. Certainly its choice to do the former ought

not to be the subject of complaint against the plaintiff, or to affect his rights. The informal resolution or order doubtless, had *it* been recorded would have been just as effective in securing the plaintiffs' rights in the premises.

But appellant perhaps insists that the board intended further action upon such resolutions after the same should be put in form.

It is clear the board did not, for they had already *passed* the *substance* of them; and the clause contained in the informal resolutions that they be referred to Eden to put in form—"*before the same should be recorded on the records of said Board "of Supervisors*"—precludes this idea. Why would the board sit again to pass upon or adopt *forms*—they had passed upon and adopted already the substance, and referred the matter of, form merely, to a more competent agent.

In addition to the language of the informal resolutions themselves, which clearly shows no further action was intended, the *law* required the clerk, *as part of his duties*, to record them. Gross' Statutes 1871, Art. XIV, Sec. 10, entitled "The Board of Supervisors," provides; "The clerk of the "County Court shall be clerk of the Board of Supervisors, "whose general duties shall be:

"1. To record in a book, to be provided for that pur- "pose, all the proceedings of the board.

"2. To make regular entries of all the resolutions or "decisions on all questions concerning the raising or payment "of moneys, * *."

Assuming then, that the substance of these resolutions passed the board in an informal shape; that the act of Eden in putting them into form was the act of the board itself; and that the clerk's duty by law, was to make a regular entry of them, and which he did, so soon as they were in form; what then may we say of the resolutions themselves as bearing upon

the question, as to *when*, the county subscribed? Adverting to the decision in 11 Ky. Reps., already referred to, and where it was ruled "that an order of the County Court, by which it "was said, that it subscribed for a specified number of shares "of road stock, *was binding*, the court having authority to "make a subscription" and testing these resolutions by that decision, we think that there can be no doubt but the county subscribed on the 16th day of December, 1869, as is recited on the face of the bonds.

Appellant makes the point in his assignment of errors that the informal resolutions only said the county *would* subscribe, and it is sought to locate the time *when it did* subscribe, as the time when Titus entered the subscription on the Railroad books. This cannot be, for, as we have already shown, he had no authority whatever to make this entry, and did it for his own purposes, the Board of Supervisors not even knowing that he did it.

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The language of the order, relating to this $80,000 subscription is (on page 11 of Transcript) "and be it further "ordered that under and by virtue of the act (citing it) the "County of Moultrie subscribed to the capital stock of the I'., "S. & M. R. R. Co. $80,000, etc., * * and be it further "ordered by the board *that when* said road is open for "traffic between Decatur and Sullivan *there be issued* $80,000 "of the bonds of said county, in denominations of not less than "$500, payable to said company, drawing interest to be paid "annually, at 8 per cent. per annum; the principal to be due "and payable ten years after date, or sooner, at option of "county; *and that said bonds be delivered* to said R. R. Co. "*in full payment of the subscription of said county so made as "aforesaid.*" This latter clause of the order throws back unmistakable light upon the preceding language and intention

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The resolutions then should be tested by themselves; and also by the subsequent recitals and acts of the ~~company~~, county which it directly authorized, and is responsible for.

The language of the order, relating to this $80,000 subscription is (on page 11 of Transcript) "and be it further "ordered that under and by virtue of the act (citing it) the "County of Moultrie subscribed to the capital stock of the I., "S. & M. R. R. Co. $80,000, etc., * * and be it further "ordered by the board *that when* said road is open for "traffic between Decatur and Sullivan *there be issued* $80,000 "of the bonds of said county, in denominations of not less than "$500, payable to said company, drawing interest to be paid "annually, at 8 per cent. per annum; the principal to be due "and payable ten years after date, or sooner, at option of "county; *and that said bonds be delivered* to said R. R. Co. "*in full payment of the subscription of said county so made as* "*aforesaid.*" This latter clause of the order throws back unmistakable light upon the preceding language and intention

of the resolutions. For why provide for this *delivery* of bonds of a certain denomination, rate of interest, etc., so soon as the road should be open for traffic between Decatur and Sullivan, *unless* the liability had been, and was intended to be, incurred *when* the resolutions were passed by the board? Why do the resolutions, or order, provide in their last clause—"that said "bonds *be delivered* to said Railroad Company in full payment "*of* THE SUBSCRIPTION *of said county* SO MADE AS AFORESAID"—unless the preceding language of the order was understood by the board *to have subscribed* the amount of the bonds in controversy?

Subsequently, also, the Committee, appointed by the board in 1872, to examine with the aid of legal counsel, railroad donations and subscriptions, made prior to that time by the county, report—[on page 15 of Transcript]—"that upon "examination of the subscription of the sum of $80,000, under "an act of the General Assembly of the State of Illinois, "approved March 26, 1869, to aid in the construction of the "Decatur, Sullivan & Mattoon Railroad Company, since con- "solidated with the Chicago & Illinois Southern R. R. Co., "*they have employed legal counsel, and find said subscription to* "*be in accordance with law.*" Thus, we see the county adopting the precaution of employing legal counsel, to clothe its order of subscription with legal form and technicality, and again, afterwards, and before it issued its bonds, appointing a committee, consisting of one less than half its members, and directing them to again employ legal counsel and examine its donations and subscriptions, and which resulted, so far as this $80,000 in controversy is concerned, as above stated in their report.

So much for the origin, language, and intention of the resolutions, or orders of subscription, found on the Moultrie County records as of its December term, A. D. 1869. It will further be seen by reference to page 10, of the Transcript, that the court finds that the charter members of the D., S. &

M. R. R. Co. met and temporarily organized in 1869, by electing a president and secretary, *pro tem.* And on page 20, of the Transcript, it will be seen that this Railroad Company, by a contract dated the 15th day of April, 1870, and signed by this president and secretary, *pro tem.*, accepted, dealt with, and pledged to contractors building the road, this subscription of $80,000 and the donation of $75,000, the aggregate of which was $155,000, and which is spoken of in the contract, (bottom of page 20, of the Transcript) as "one hundred and fifty-five "thousand dollars of Moultrie County Bonds."

We see afterwards that Isaac Keys received these $80,000 of bonds *for* the contractors, "to whom the Railroad "Company had previously, by order on their records, directed "these bonds and coupons, when executed, to be delivered." See page 18, of the Transcript. Thus, we see an acceptance of, and a dealing with, this subscription, by the Railroad Company long before the Constitution of 1870 became operative, and shortly after the subscription and donation was made by the board at its meeting in December, 1869.

The Supreme Court of Illinois in Tonica and Petersburg Railroad Company, 21 Ills., p. 72, say "that a subscrip-"tion made *in contemplation* of a charter to construct a rail-"road, or to accomplish any other legitimate object, is a valid "contract between the parties, and may be enforced," etc.

In this case, there is a subscription and donation of $155,000 to this Railroad Company in 1869, not in contemplation of a charter, but long after the charter was granted and after the Railroad Company had been temporarily organized. The order of subscription provides for the denomination of the bonds, the rate of interest they shall bear, the length of time they shall run, *and that they shall be delivered* to the R. R. Co. *when it is open for traffic* between Decatur and Sullivan. Before the passage of this order in 1869, the Railroad Company had been organized, by the directors named in the charter,

meeting and electing president and secretary *pro tem.* These temporary officers of the railroad enter into contract with parties to build the road, and as part pay therefor, pledge and promise them, in the contract, this $155,000 of Moultrie County bonds a few months previously ordered to be delivered when the road is open for traffic. Is not this *mutuality*, between the county and the railroad, regarding this subscription and donation?

The county had done all it *then* could; it had provided for the bonds and ordered them to be delivered *when* the condition of the charter contained in § 10 thereof had been complied with. The railroad also did all *it then* could in the way of accepting these bonds; they pledged and contracted them *in futuro*, to the parties who were building the road and putting it in condition where it would be open for traffic so that the county could issue, and they themselves could receive the bonds according to the terms of the contract.

Would this state of facts not also invoke the application of § 1, of the schedule to the Constitution of 1870? It provides that "all *rights*, actions, prosecutions, *claims* and *contracts* of this State, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been "adopted." Before the Constitution of 1870 became operative, had not "rights" and "claims" of these contractors accrued? and had not a contract of this body corporate R. R. become binding upon it, to be performed by it *in futuro* when the condition had been performed entitling it to the bonds from the county?

Appellant's counsel, also, complain that after these orders were put in legal form by Eden, as directed by the board, and returned by him to the County Clerk, they were never read over to the board at any of its subsequent meetings! We ask, whose fault or neglect was this? There is no controversy but that the board appointed Eden in Decem-

ber, 1869, to put their informal resolution of subscription, which they then passed, into form, "before the same should be recorded." Did they never care to inquire afterwards what their agent and attorney had done regarding this order, by which they had disposed of $155,000 of the county money? Did the board never communicate with their chairman or clerk, regarding his discharge of so important a trust? Is there anything in the record showing the clerk was concealing from the board the fact that their commission to Eden had been discharged by him, and that he had reduced their resolutions to form, and that the same had been recorded thereafter upon the records of the board as of its December Term, 1869?

These orders were spread at large on their records, by their clerk, in pursuance of his legal duties, so soon as the same were put in form and returned to him, and were open to the inspection of the members of the board as well as the public thereafter.

It seems, afterwards, and before the bonds issued, the County Committee of Three, appointed by the board in 1872, as well as the attorney whom they employed in obedience to the directions of the board, *knew of these orders*, turned to the records of the board, examined them, and reported that the subscription thereby made *was in accordance with law.*

We think, the doctrine of estoppel precludes the county, at this late day, to set up such neglect of its own agents and officers, as against third parties who have acquired rights, without notice. In this connection, let us consider the effect of the recitals in the bonds, as an estoppel against the county, and in view of which, the Circuit Court considered the plaintiff had a right of recovery.

These bonds recite two supposed facts, viz.: that they are issued in conformity to the provisions of a certain act of the legislature, citing it by date and title, and also, that they are issued in pursuance of the subscription *made by the board* in conformity to the provisions of the act, in December, 1869.

In City of Lexington vs. Bullen, 13 Wall 296, this court holds "that when a corporation has power, under any "circumstances, to issue negotiable securities, the bona fide "holder has a right to presume that they were issued under "the circumstances which give the requisite authority, and are "no more liable to be impeached in the hands of such a "holder than any other commercial paper."

From the recitals on these bonds the purchaser would have a right to presume that the power conferred on the Board of Supervisors of Moultrie County, had been regularly exercised, viz: that the board had, upon proper notice, and at a competent meeting, and by suitable order or resolution, exercised the power conferred upon it by the tenth section of the charter, in the manner and to the extent recited, and that the officers signing and issuing the bonds had been competently and regularly authorized by the board so to do.

To hold less than this, in regard to bonds containing recitals such as these do, and where the power in the municipality to issue, is ample, would render such securities worthless as negotiable instruments, in distant markets, where they are mainly intended to be sold. In the case of Moran vs. Miami County, 2 Black, this court cite, and approve, a decision in 6 Ellis and Blackburn, which was a suit upon a negotiable bond issued by a joint stock company, in which the English Court say—"a purchaser is not bound to do more "than read the deed of settlement and statute * * * "and finding that the authority might be made complete by "a resolution, he would have a right to infer THE FACT OF A "RESOLUTION authorizing that which, on the face of the docu- "ment APPEARED to be legitimately done."

In the case at bar, a purchaser, from examining the tenth section of the charter, would see that the Board of Supervisors of Moultrie County could in the customary manner, by order or resolution, make the subscription, thereby

authorized, complete. Would not then a purchaser have the right to infer the fact of such a resolution authorizing that which, on the face of these bonds, appeared to be legitimately done? The doctrine of this court seems settled "that the "validity of municipal bonds will be sustained wherever an "authority to issue them is conferred by law, although that "authority may have been accompanied with conditions and "limitations which were disregarded by the municipal "authorities."

Judge Nelson, in giving the opinion of this court, in Knox County vs. Aspinwall, 21 How, very broadly expresses the doctrine of estoppel by reason of recitals in the bonds— "that where the bonds on their face import a compliance "with the law under which they issued, the purchaser is not "bound to look further for evidence of a compliance with "the conditions of the grant of power."

The condition annexed to the grant of power, which the defense in the Aspinwall case alleged was neglected, was the want of the notice of the election, as required by law, yet it is held that a bona fide holder for value of a bond issued under an act of the legislature, has a right to presume that all precedent requirements of the act conferring the power have been complied with. So that the want of the notice required by law, in that case, was held immaterial, because, the bonds reciting a compliance with the act, worked an estoppel against such defense being set up against the bona fide holder of the bond. Again, in the case of Grand Chute vs. Winegar, the seventh plea set up the defence that no election as required by law had been held, the Circuit Court sustained a demurrer to this plea, and upon appeal, this court affirmed the decision. The plea was held bad, and the want of an election held to be no defence. This court holding, that even where such a condition, annexed to the grant of power, had been omitted to be performed, yet the purchaser was not bound to look beyond

the face of the bonds to learn whether or not it had been performed or omitted, provided the bonds recited a compliance with the law.

In the case of Flagg vs. the City of Palmyra, decided by the Supreme Court of Mo., in 1863, it was held "that if "the bonds have been issued by the city, in apparent compli- "ance with the law, and themselves gave no evidence of a "want of performance of the prerequisites to their issuance, "and no actual notice of any such defect is traced to the "bondholder, we will not hold the bondholder to be affected "by a failure of the officers of the city to perform all that "was required by law of them, in anticipation of and prepar- "ation for the issuing of these bonds. Being issued in ap- "parent conformity to law, the public (any of whom might "acquire the bonds) is entitled to view them as issued in "actual conformity to the law, and to suppose that all the "acts required of the people and officers of the city had been "duly performed."

In the case of Smith & Hall vs. Clark County, decided by the same Court at its October Term 1873, it was said that "the issuing of the bonds authorized the receiver or pur- "chaser thereof to suppose that all those things (enumerating "the conditions annexed to the grant of power) if required "by law, had been done in the true form and substance re- "quired by law." And again, upon a rehearing of the last cited case by the Supreme Court of Mo., Napton, J. reiterating what the former decision had been, said; "the next point "was, whether, if the bonds were conceded to have been "issued under the law of 1855, which on their face, they "purported to have been, the absence of an election defeated "a recovery on them; and, upon this point, I referred to the "decisions of the Supreme Court of the United States, and "to the decisions of this court anterior to, and long after, the "issue of the bonds in controversy, and showed that both "courts held such bonds valid, *in despite of the want of an elec-*

"*tion.*" In Mercer Co., vs. Hackett, 6 Wall, it was held, "that "where a county issues its bonds payable to bearer and sol- "emnly pledges the faith and credit and property of the county, "under authority of an act of the Assembly, referred to on "the face of the bonds by date, and the bonds pass into the "hands of a bona fide holder for value, the county is bound to "pay them; that it is no defence that the act of the assembly "referred to on the face of the bonds authorized their issue "only on and subject to, certain limitations, restrictions and "conditions, which have not been complied with, nor that the "bonds were sold for less than par, when the act authorizing "their issue declared that they should in no case, nor under "any pretence, be so sold. * *" In Meyer vs. The City of Muscatine, 1 Wall, this court said, "if the legal authority was suf- "ficiently comprehensive, a bona fide holder for value has a "right to presume that all precedent conditions have been "complied with."

These decisions, and numerous others seem to warrant us in concluding that the aforesaid recitals in the Moultrie Co. bonds estop the county from setting up the want of compliance with the law, on the part of the county or its officers in issuing the bonds, in those respects wherein there *seems* to have been a compliance, from the recitals in the bonds.

A purchaser could see from the 10th section of the charter that the Board of Supervisors of the County could subscribe; he would further know, from the general law, that they could effect such subscription by an order or resolution subscribing the amount, and authorizing certain of their officers to execute and deliver the bonds. Finding its bonds upon the market containing recitals that they were issued in pursuance of a subscription made at a certain meeting of the Board, in conformity with an act of the legislature, citing it by date and title, would he not be fully authorized to purchase without inquiring further; and would he not have the right

to presume that all those things had been done in the true form and substance required by the law?

Appellant's 5th assignment of error draws in question the right of the county to issue and deliver these bonds to the consolidated R. R. Co., instead of to the D. S. & M. R. R.

On p. 18 of the transcript the court specially finds that the consolidation between the D. S. & M. R. R. Co., and the C. & Ill. Sou. R. R. Co., was "*legally made.*"

That being so, the decision of this court in Nugent vs. The Supervisors of Putnam Co., settles the right of the consolidated Co. to demand and receive these bonds.

The sixth assignment of error, is nice, rather than sound, it alleges error because the court rendered judgment for plaintiff after finding that the board never authorized their chairman or clerk to issue said bonds to the *consolidated* company.

On p. 18 of the transcript the finding of the court referred to appears: It is "that the board never authorized the "issuing of said bonds to the consolidated Co., *except by the re-* "*solutions aforesaid.*"

The "resolutions" referred to, are on p. 13 of the transcript and were passed at a meeting of the board in 1872, and directed the chairman to appoint a committee of three to examine the "subscriptions of railroad donations" with and under the advice of legal counsel, and upon their report being made, "upon all such roads as may be found legally entitled "to bonds, the chairman of this board on its behalf, in con- "nection with the county clerk, shall execute, issue and de- "liver *to said parties*, Moultrie Co. bonds. * * *"

When the committee made its report regarding this subscription of $80,000, (p. 15 of T.) they reported that they had examined with the advice of legal counsel this subscrip-

tion to the D. S. & M. R. R. Co., "*since consolidated with the C.* "*& Ill. Southern R. R. Co.*," "and found said subscription to be "in accordance with law."

Thereafter in their report (p. 16 T.) they recommended that upon receipt of notice in writing that said road was open for traffic between D. & S., the bonds in question be issued.

Thus we see that the board appointed a committee and furnished it with legal counsel, and the committee so aided, found that there had been a consolidation, and yet also found that the subscription was nevertheless in accordance with law, and recommended the bonds being issued when the proviso to sec. 10 was complied with. The committee knew the bonds must go to the consolidated road and yet they recommended in their report to the chairman that they be issued.

The bonds were afterwards, after the report to the chairman had been filed in the clerk's office, and after the notices set out on p. 16 of T., had been served upon both the chairman and clerk of the board, issued and delivered to "Isaac Keys, who was representing the contractors of the R. "R. Co. to whom the R. R. Co., had previously, by order on "their records, directed these bonds and coupons, when exe- "cuted to be delivered." See p. 18 of T.

The bonds also upon their face recite the consolidation, and there can be no question in law, but that if the county subscribed and issued the bonds after the consolidation had been legally made, the consolidated Co., had the legal right to receive the bonds.

The County Clerk, is required by the 9th sec. of the charter to countersign all bonds issued in pursuance of the act, and both he and the chairman were authorized by the order of the board passed Dec. 1872 to execute, issue and deliver bonds to such roads as the committee with the aid of counsel found entitled thereto under subscriptions and donations previously made.

Complaint is made by appellant that the clerk of the board interpolated in the orders of donation and subscription returned to him by Eden for record, the "last clause" therein authorizing the chairman to issue and deliver the $80,000 of bonds whenever the railroad was completed and equipped through the County of Moultrie.

Suppose this was so, what harm did the county receive from, this fraud if you please, of their own agent? The proviso of section 10 was also retained in the orders, and the bonds were actually not issued until its terms were complied with as recommended by the report of the committee. The clerk's unauthorized interpolation did not vitiate the balance of the resolutions, and while his clause remained a dead letter, the other condition of the resolutions of subscription and which was the charter condition, was complied with. The committee report that they "passed over said road from Sul-"livan to Decatur, and find said road constructed."

It was decided in Butler vs. Dunham, 27 Ills., p. 474, that fraud in the election authorizing the subscription must be set up before rights have accrued. So, in this case, if the clerk or other county officers, did fraudulent acts connected with the exercise of the power of the county in subscribing, it is too late to set up such fraud, since the rights of innocent holders have accrued.

It was decided by this court in Smith vs. Sac County, 11 Wall, that where the defendant shows fraud in the origin or inception of the bonds, this throws the burden upon the holder of showing that he gave value for them before maturity. Plaintiff has proved his rights to be within this rule.

In the case of Grand Chute vs. Winegar, it was said that the cases there decided were an abundant answer to the want of compliance with the forms of law or fraud in their own agents. Also, 24 Ill., p. 90, Johnson vs. County of Stark.

There is another principle of estoppel which we conceive applies in this case. On page 18 of Transcript, the court finds that sometime before the bonds were issued and delivered, stock of the D., S. & M. R. R. Co. to the amount of $80,000 was signed by the president and secretary of the company and held by said Smyser as County Clerk.

Doubtless the articles of consolidation provided that all stockholders of the D., S. & M. R. R. Co. should also be stockholders in the consolidated company. So that, the retention of this stock by the county, constitutes the county a stockholder in the Chicago & Illinois Southern Railway Company. This brings the case, as we believe, fairly within the decision of Pendleton County vs. Amy, 13 Wall, 297.

The County of Moultrie is now retaining this stock in the hands of its clerk; and its officers, whether with or without its license, have voted that stock at the railroad election of officers. The railroad, which was the inducement to the county to subscribe, has been constructed and is in full operation, and in the language of Sedgwick on constitutional law, quoted and applied by this court in Pine Grove T. P. vs. Talcott, "A party who has had the benefit of the "agreement cannot be permitted, in an action founded on it, "to question its validity. That it would be in the highest "degree inequitable and unjust to permit the defendant to "repudiate a contract, the fruits of which he retains." And if the county has any cause to complain of fraud in the issuance of these bonds, the record shows that the fault lies with its own agents and officers, and not with the plaintiff, and as was decided in Prettyman vs. Supervisors of Tazewell County, 19 Ills., p. 414, steps must be taken in apt time, where fraud is relied upon to prevent the issue and negotiation of the bonds, otherwise it will be inequitable to set up such defence after unwarrantable delay and the bonds get into the hands of bona fide holders.

The record shows, that from the earliest history of the road, when the County Clerk Smyser was elected secretary, *pro tem.*, in 1869, up to the issuing of the bonds, the County officers were more or less officers or directors of the R. R. Co And in the language of the Supreme Court of Illinois in Johnson vs. County of Stark, 24 Ills., p. 90, "Nor does it make "any difference that the enterprise in which they engaged has "proved to be ill advised, if it was within the scope of their "authority * * they were left entirely free to choose for "themselves whether they would lend the aid of the county "to the enterprise * * * By issuing these bonds to the "company the county has become one of the largest owners "of, or shareholders in the road, and in common with the other "shareholders, undertook its control and management by "directors and officers of their own choice. And there can "be no pretense of right to impose the loss growing out of the "want of success in the enterprise, upon the bona fide holder "of the identical bonds given by the county to become a part "owner of this road."

CULLOM, SCHOLES & MATHER,

Att'ys for Appellee.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

The County of Moultrie,

Plaintiff in Erro

vs.

The Rockingham Ten Cents Saving Banl

Defendant in Error.

Error to the Circuit Court of the Unite States for the Southern District of Ill.

BRIEF AND ARGUMENT OF

CULLOM, SCHOLES & MATHER

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